No. 14,197

United States Court of Appeals
For the Ninth Circuit

W. O. BEDAL,
Appellant,

vs.

THE HALLACK AND HOWARD LUMBER COMPANY, a corporation,
Appellee;

and

W. O. BEDAL,
Appellant,

vs.

OREGON SHORT LINE RAILROAD COMPANY, a corporation, and UNION PACIFIC RAILROAD COMPANY, a corporation,
Appellees.

Appeals from the United States District Court for the District of Idaho.

OPENING BRIEF FOR APPELLANT.

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JURISDICTION.

On October 3, 1952, the Oregon Short Line Railroad Company, a corporation, and the Union Pacific Railway Company, a corporation, commenced this ac-

tion against The Hallack and Howard Lumber Company, a corporation. The plaintiffs alleged in paragraph I of their complaint that each of them were corporations organized and existing under the laws of the State of Utah. Plaintiffs also alleged that The Hallack and Howard Lumber Company was a Colorado corporation. Further, paragraph I stated that the matter in controversy exceeded, exclusive of interest and costs, the sum of $3000.00. (R. 3.)

The defendant, The Hallack and Howard Lumber Company admitted in paragraph I of its answer to plaintiffs' complaint, that the plaintiffs were corporations organized and existing under the laws of the State of Utah; that The Hallack and Howard Lumber Company was a corporation organized and existing under the laws of the State of Colorado, and that the matter in controversy exceeded, exclusive of interest and costs, the sum of $3000.00. (R. 68.) By these admissions the District Court for the State of Idaho had original jurisdiction of the civil action contained in plaintiffs' complaint since the action was between citizens of different States, and the matter in controversy exceeded, exclusive of interest and costs, the sum of $3000.00. Jurisdiction existed under Title 28, U.S.C.A. 1332.

On August 31, 1952, the defendant, The Hallack and Howard Lumber Company asked the trial court for leave to make W. O. Bedal, a citizen and resident of the State of Idaho, a party to this action, and asked that a summons and third party complaint be served on him. (R. 17.) The court by an order

dated November 14, 1952, made W. O. Bedal a third party defendant to the action. (R. 18.) The defendant, The Hallack and Howard Lumber Company brought in the third party defendant, W. O. Bedal, under authority of Rule 14 A of the Federal Rules of Civil Procedure.

The third party defendant, W. O. Bedal answered the complaint of the plaintiffs and the third party complaint of The Hallack and Howard Lumber Company on August 27, 1953. (R. 72.) In paragraph I of W. O. Bedal's answer to the complaint of the plaintiffs, the plaintiffs' allegations that they were corporations organized and existing under the laws of the State of Utah; that the defendant, The Hallack and Howard Lumber Company was a corporation organized and existing under the laws of the State of Colorado, and that the matter in controversy between them exceeded, exclusive of interest and costs, the sum of $3000.00, were admitted. (R. 72.)

The case of the Oregon Short Line Railroad Company, et al., plaintiffs, v. The Hallack and Howard Lumber Company, defendant, came on for trial before the Court and the case of The Hallack and Howard Lumber Company, defendant, and third party plaintiff, v. W. O. Bedal, third party defendant, came on for trial before the court and jury on September 21, 1953, with Honorable Chase A. Clark, Judge of the United States District Court, in and for the State of Idaho, presiding.

On September 22, 1953, a judgment against The Hallack and Howard Lumber Company in favor of

the plaintiffs was entered and filed in the amount of $18,334.15. (R. 104.) On September 23, 1953, the Honorable Chase A. Clark granted the third party plaintiff's motion for a directed verdict and on the same date the jury returned a verdict according to such direction in favor of The Hallack and Howard Lumber Company and assessed damages against W. O. Bedal in the sum of $18,334.15. (R. 105, 245.) On September 23, 1953, the lower court entered judgment, and judgment was filed against W. O. Bedal, and in favor of the third party plaintiff, The Hallack and Howard Lumber Company, in the sum of $18,334.15. (R. 107.)

On October 20, 1953, appellant filed with the trial Court a notice of appeal from the judgment entered in favor of The Hallack and Howard Lumber Company, and from that order of the United States District Court granting the third party plaintiff's motion for a directed verdict. (R. 114.) Also on October 20, 1953, third party defendant, W. O. Bedal, appealed from the judgment entered in favor of the Oregon Short Line Railroad Company and the Union Pacific Railroad Company, and against the defendant and third party plaintiff, The Hallack and Howard Lumber Company, and also from the Findings of Fact and Conclusions of Law filed in support of the judgment. (R. 117.)

In a stipulation dated January 15, 1954, and filed with the Court of Appeals on January 21, 1954, entered into by and between the counsel for all of the respective parties to this action, it was agreed that

in both the appeal from the judgment in favor of the plaintiffs, Oregon Short Line Railroad Company and Union Pacific Railroad Company, and the appeal from the judgment in favor of The Hallack and Howard Lumber Company against W. O. Bedal, that one transcript and one printed record could be used. The jurisdiction of this Court to hear both appeals is based upon 28 U.S.C.A., 1291, 1294, 2107, and Federal Rules of Civil Procedure, Rule 73.

STATEMENT OF FACTS.

The defendant appellant in this case is W. O. Bedal. W. O. Bedal was brought in as a defendant by way of a third party complaint filed by The Hallack and Howard Lumber Company. Originally the plaintiffs, the Oregon Short Line Railroad Company and the Union Pacific Railroad Company filed a complaint against The Hallack and Howard Lumber Company seeking damages in the amount of $17,001.98, together with interest from December 15, 1951. In their complaint against The Hallack and Howard Lumber Company, the plaintiffs allege that on March 3, 1944, the plaintiffs, as lessor, leased certain ground to The Hallack and Howard Lumber Company as lessee, which property is located near Banks, Idaho. (R. 3, 4.) Plaintiffs, hereinafter called the "Railroads", alleged that in this lease The Hallack and Howard Lumber Company agreed to hold the Railroads harmless from any lien, fine, damages, penalties, forfeitures or judgments in any manner accruing "by reason of

the use or occupation of said premises by the lessee; and that the lessee shall at all times protect the lessor and the leased premises from all injury, damage, or loss by reason of the occupation of the leased premises by the lessee, or from any cause whatsoever growing out of said lessee's use thereof."

The Railroads then allege that on September 15, 1949, a certain A. M. Powell, an employee of the Union Pacific Railroad Company, was injured while the defendant, or its agents, servants or employees were loading logs onto the leased premises. (R. 4.) The Railroad gave notice to the defendant, The Hallack and Howard Lumber Co., of Powell's action against the Railroad, and tendered the defense of the action to it. (R. 5, 70.) On March 2, 1951, a jury returned a verdict in favor of Powell in the amount of $15,000.00, together with costs in the amount of $92.26, the total of which was compromised on December 15, 1951, for $14,500.00, and that judgment was satisfied by the Railroad. (R. 135, 151.) The Railroads' complaint then alleges that the injury to Powell resulted from the use and occupation of the leased premises and that The Hallack and Howard Lumber Company should indemnify the Railroad Company by reason of the indemnity provision in such lease. (R. 4.) It was alleged also in the complaint against the Lumber Company that the Lumber Company was liable by reason of the lease agreement, or independent of the lease agreement. (R. 7.) Nowhere in the complaint is it alleged specifically that The Hallack and Howard

Lumber Company was liable because of any negligence.

After suit was brought against The Hallack and Howard Lumber Company, hereinafter referred to as the "Lumber Company" it filed a third party complaint by leave of Court against W. O. Bedal. (R. 19.) In its third party complaint it alleges that W. O. Bedal, hereinafter called "Bedal", was unloading the logs on the day that Powell was injured, which was September 14, 1949. The Lumber Company further stated in its complaint that Bedal was an independent contractor, and agreed to haul logs for the Lumber Company, unload them at the Banks site, and load them on to the railroad cars. It is claimed by the Lumber Company that Bedal is primarily responsible for the injuries that occurred to Powell, and thus responsible ultimately for the damages sustained by the Lumber Company by reason of the judgment entered against it in behalf of the Railroad. The Lumber Company in its complaint also stated that Bedal was liable by reason of a written indemnity agreement contained in Bedal's logging contract. (R. 20, 21.) A copy of the logging contract was attached to the complaint, as Exhibit "D" together with certain amendments. (R. 27, 48.)

The Lumber Company also alleges in its complaint that it advised Bedal of the action by the Railroad against the Lumber Company in a letter dated October 14, 1952, which was attached to the complaint and introduced in evidence at the trial as

Exhibit "E". (R. 49.) This letter advised Bedal that the *Railroads* had commenced an action against the Lumber Company and that the Lumber Company looked to Bedal to hold it harmless. In this letter the Lumber Company asked Bedal to appear and defend the action against it in the United States District Court. This notice was given, the Court should remember, with regard to the *present* action between the Railroad and the Lumber Company.

In another letter attached to the complaint against Bedal, Exhibit "F" (R. 52), and dated January 10, 1951, an authorized agent of the Lumber Company notified Bedal that Powell had filed a complaint against the Union Pacific Railroad Company, asking for damages in the sum of $45,000.00. The letter advised Bedal that the Lumber Company would look to Bedal and his insurance carrier to hold the Lumber Company harmless from any liability that might attach to it by reason of Powell's filing a complaint against the Union Pacific Railroad Company. The Court will note that in this letter (Exhibit "F"), the Lumber Company did not tender the defense of the action by Powell against the Union Pacific Railroad Company to Bedal, nor did it ask Bedal to intervene in that case and protect the interest of either the Railroad or the Lumber Company. Exhibit "F" was attached to the Lumber Company's complaint by amendment on April 1, 1953. (R. 61, 64.)

Bedal admitted in his answer that the lease between the Lumber Company and the Railroad was a true

copy, and that on September 15, 1949, the lease agreement was in full force and effect. (R. 72, 73.) In answer to the Lumber Company's complaint Bedal admitted that he was an independent contractor. (R. 75.) Bedal also admitted that he or his agents were unloading logs at Banks, under a logging contract, and that a piece of timber broke off a log and struck Powell, an employee of the Union Pacific Railroad Company, and alleged the fact to be that this accident did not occur by reason of any negligence whatsoever on the part of Bedal. (R. 75, 76.)

Prior to the trial of the case the Railroads moved to strike the special and affirmative defenses of Bedal to their complaint. (R. 84.) The Lumber Company made a similar motion. (R. 86.) The trial Court sustained the Railroad's motion to strike the affirmative defenses of the answer of Bedal to the Railroad's complaint, (R. 89) but the motion of the Lumber Company to strike the affirmative defense was denied without prejudice. (R. 89.)

It was stipulated by and between all of the parties at the trial of the two cases that in lieu of producing personally certain witnesses that the testimony of Harry M. Hansen, Charles Ritter, Albert Parrish, and Howard Sage, whose testimony appears in the case of A. M. Powell, plaintiff, v. Union Pacific Railroad Company, defendant (Case 2776), be admitted into the record of the present actions.

The Railroads' case against the Lumber Company was tried before the Court without a jury and the

Lumber Company's case against Bedal was tried before the Court *and* jury. (R. 90.) At the trial of the case the trial Court admitted into evidence certain papers and pleadings in the case of A. M. Powell v. Union Pacific Railroad Company, consisting of the complaint of Powell, the answer of the Union Pacific, the verdict of the jury, and the judgment of the Court, the Union Pacific's motion for a judgment notwithstanding the verdict, the order of the Court overruling the Railroad's motion for such judgment, the Railroad's motion for supersedeas bond, the Court's order granting such bond, the Railroad's notice of appeal, the supersedeas and cost bond, designation of the record on appeal, reporter's transcript, notice to the appellee of the appeal, the filing of bond, order extending time for filing record on appeal, satisfaction of judgment, and notice to dismiss appeal. All of the latter were admitted as plaintiff's Exhibit No. 2. (See pp. 128, 154.)

The Railroads then submitted as Plaintiffs' Exhibit No. 3 the request for admissions served upon the Lumber Company which were not answered, and which under Rule 36 were deemed to be true. (R. 155, 156.) By these admissions the Lumber Company admitted that a piece of timber broke off a log and injured Powell on September 15, 1949. It also admitted that Bedal or his servants were using the premises covered in Exhibit "A" and that Powell was injured while logs were being unloaded from the truck. The Lumber Company also admitted that it owned the logs

that were being unloaded from trucks and then loaded on the railroad cars at Banks, Idaho, and that Bedal was performing the loading and unloading on behalf of the Lumber Company. Further the Lumber Company admitted that Bedal was paid for these services.

Plaintiffs' Exhibit 4 contained admissions of the third party defendant, W. O. Bedal (R. 158), which were similar to those just mentioned except Bedal denied that he was loading logs at the time Powell was injured. (R. 158.)

The Railroads then called Earl W. Bruett as a witness. He was the assistant engineer for the Union Pacific Railroad Company. (R. 161.) Plaintiffs' Exhibit 5 was introduced which was a blueprint showing the railroad track and right of way and the premises leased to The Hallack and Howard Lumber Company at Banks. (R. 162, 13.) The leased area is shown in yellow. Certain trees were shown on the blueprint and the word "trees" was written opposite them. (R. 163.) At that place Burett testified the roadway on the lease was 18.7 feet higher than the top of the railroad below. (R. 164.) In general the track shown in the lease ran north and south. (R. 162.) From the top of the roadbank east toward the railroad track there was a drop. However, there was a level portion between the tracks and the foot of the drop which amounted to approximately 15 or 20 feet. (R. 166.) The road was right at the very edge of the slope. The length of the slope at the place near the clump of trees was about 47 feet. (R. 167.) From the center of the side track shown on the map, Plain-

tiffs' Exhibit No. 5, to the edge of the lease is 8.5 feet, according to Bruett. The track itself is 4 feet 8½ inches wide between the rails. Thus the leased property would be about 6 feet from the west line of the railroad track. (R. 168.)

The Railroad next presented the testimony of George Hibbard, an employee of Bedal's, who was unloading his truck at the time Powell was injured on September 14, 1949. (R. 168.) Hibbard stated that he was unloading logs from a truck near a clump of trees at about the time Powell was injured. He marked an (x) in red pencil at that place. (R. 170.) The logs were unloaded and pushed toward the track. The logs would be unloaded by putting a cable underneath the load and then by using a boom. A bulldozer would push the logs off the truck and down the slope. (R. 169.) Hibbard, while using the bulldozer, would be on the west side of the logs at the time they were unloaded (R. 171), although on page 169 he stated that he was "east on the side". Nevertheless, in answer to a question on page 171, in which he was asked if he was standing on the opposite side of the load of logs from where the railroad cars were down below, he answered "Yes." (R. 172.)

Earl W. Bruett was recalled by counsel for Bedal at which time he stated that the elevation from the point Hibbard marked on the map, plaintiffs' Exhibit 5, from the roadway to the railroad track was 18.7 feet.

Plaintiffs' Exhibit No. 6 was introduced and admitted, consisting of the Railroad's costs, expenses

and attorney's fees in the trial of the earlier case brought by Powell against the Union Pacific Company. (R. 174.)

The Railroad then introduced certain portions of the testimony of Albert M. Powell, the plaintiff in the earlier action. (R. 176.) This testimony was admitted only in the Railroads' case against the Lumber Company.

At this point it should be noted that both the Railroads and the Lumber Company introduced Exhibit No. 7 for the purpose of showing the scope of what was adjudicated in *Powell v. Union Pacific Railroad Company.* (R. 174, 235.) Exhibit 7 consists of the transcript of the proceedings in the *Powell* case together with the Court's instructions. Although in the Railroad's action against the Lumber Company the Railroad did not read all of Powell's testimony into the record, nevertheless, since it also appears as the Lumber Company's Exhibit No. 7, it is convenient to include all of the pertinent testimony of Powell as it appears in the original transcript. For the purpose of this Statement of Facts the testimony of Powell as it was introduced into the record will be noted first and the testimony that was left out of the present record, but as it appears in Exhibit No. 7, will be examined next.

Powell was a car inspector for the Union Pacific Railroad Company, and went to work at Banks, Idaho, on June 1, 1949. (R. 177.) Powell's duty was to inspect the loaded railroad cars after logs were

placed on them by means of a loading machine. (R 178.) Powell testified that the loading track was within two or three feet of the bunkers. The bunker was simply a row of logs, one on top of the other, placed near the track to keep the logs that rolled down the hill from coming into violent contact with the cars on the other side of the bunker.

In describing the logging operations, Powell stated that the trucks would come in from the west on a little private road. The truck would stop and a caterpillar with a hoist on it would operate in such a way as to lift the load off the truck, and the logs would roll down and hit the bunker log, and they would stop if the bunker log stopped it. The bunker logs in front of the track were about 6 to 8 feet high at the time of the accident. Immediately prior to the accident the bunker was full of debris, limbs, small logs and bark, making it difficult for the bunker to stop the logs, and some of them would spill over and strike the cars. (R. 180.) Harry Hansen and Charles Ritter also testified that there was debris behind the bunkers. (R. 215, 196, 197.)

On the morning of the accident Powell had gone about 60 to 80 feet north of the railroad car towards which a truck was about to unload logs. (R. 181.) He stepped from the top of the empty railroad car up about two feet to the bunker. (R. 182, 183.) He went north of the place the truck was unloading in order to be in a safe place and stood with three other men, Ritter, Hansen and Parrish. (R. 184.) Powell

did not see anything coming through the air until Ritter yelled "Look out there", and then he saw the slab, possibly three feet from him. (R. 185.) Powell was hit and injured and because of these injuries he brought his action against the Union Pacific Railroad Company, (R. 185), because of its failure to furnish him a safe place to work. (R. 128, 130.)

Powell also pointed out that in loading the railroad cars the cars would start being loaded on the south end of the bunker, and then as each car was loaded the one next to it to the north would be loaded, and the trucks on the road would dump the logs to each particular car, depending on which was to be loaded. (R. 187.) Bedal was responsible for cleaning out the debris behind the bunker. (R. 190.) The logs that made up the bunkers were the largest logs that Bedal could obtain. (R. 191.)

The testimony of Harry H. Hansen was read into the record. The Hansen testimony appeared in the prior case of *Powell v. Union Pacific Railroad Company.* Hansen was employed by Bedal and was standing near Powell at the time of the accident. (R. 199.) The testimony of Hansen that is new is that the loader near the railroad car was shut down so that the logs could be dumped off the truck. (R. 200.) Like Powell, Hansen did not see the slab when it broke off the log. (R. 22, 204.) Hansen claimed that he had been in the same business since he was 18 years old, now being 32 years old, and that the men below the unloading logs always moved away

from them when they rolled down the hill. (R. 205.) Hansen testified that in his experience he had never seen a slab that large let go. (R. 206.) Hansen speculated that probably the slab came from an unseen splinter from one of the logs in the load. (R. 206.) Hansen also stated that logs had been unloaded at Banks in the same manner for a long time. (R. 207.) Page 208 of the Record shows Hansen was asked:

> "During that time—let me ask this, operation of the unloading of logs at the time Mr. Powell was injured, was it the same operation that you had been performing since May, 1949, since you had been there?
>
> A. Yes, sir."

Hansen also testified that when the logs came off the load they came down with quite a force. (R. 208.)

The testimony of Charles Ritter was then read into the record. Ritter also was employed by Bedal. (R. 211.) Ritter added to the testimony of the others a few items. First he described how the logs were pushed off the trucks. He testified the logs were pushed off in a series. Four or five would go at a time, and there would be about three pushes per load. (R. 215, 216.) He, like the other men, including Powell, always went about 60 feet away to get away from the logs being unloaded. (R. 216.) Unlike either Hansen or Powell, Ritter saw the slab break off the log. The slab did *not* break off the log when it hit the flat place below where the debris was,

but instead broke off when it was about half way down the hill. (R. 217.) It weighed approximately 80 pounds and was 4 or 5 feet long. Again, on page 221 of the transcript, Ritter pointed out that the log had gone half way down the bank—down the 50 foot incline—when he saw the slab break off the log and fly through the air, at which time he hollered. Ritter also testified that the logs were handled that day just as they were handled prior to that time that this truck load was dumped. (R. 218.) Further, Hansen, like the others, had never seen a slab like this break off before. (R. 218.) Usually bark flew off and went straight down the hill although at different times bark might go off at certain angles. (R. 220.) It was Hansen's belief that the slab flew off the first bunch of logs that came down the hill, but he was not sure. (R. 222.) He was sure that only one slab flew off. (R. 223.)

Albert Parrish's testimony was also read into the record. (R. 224.) He did not see the slab break off, although he saw it in the air, about 10 or 12 feet from the logs, flying toward the east. (R. 22, 225, 226.) Parrish also stated that he thought the bunker logs were about three or four feet from the railroad cars. (R. 227.) Parrish too, was employed by Bedal.

The next witness, Howard Sage, was employed by The Hallack and Howard Lumber Company. He was a scaler. He would scale the logs and determine the number of board feet in them before they went onto the railroad cars. Sage's testimony was the last

read into the record. He, too, had gotten away to what he called a safe place—about 60 feet from where the logs rolled down the hill. (R. 229.) Sage did not see the slab break off, but did say he saw it in the air and testified it came from the west and south. He also testified on pages 231 and 232 in part as follows:

> "Q. Do you know about how far those logs were down the hill after they had been dumped, when you saw the slab coming through the air?
>
> A. About half way, I would say.
>
> Q. I presume that you had watched this kind of unloading for a long time up there?
>
> A. Hundreds of times, yes, sir.
>
> Q. Had any thing of this particular nature ever occurred before?
>
> A. I have never noticed anything like this, no, sir.
>
> Q. Had you seen anything fly off those logs before?
>
> A. Yes, pieces of bark would be about all."

Sage testified that the average log contained about 200 board feet and weighed about 9 pounds per board foot, and the distance from the top of the logs, that is the top of logs on the truck to the ground was 12 or 13 feet. (R. 232.) Finally Sage said the logs were on their own when they were dumped from the truck. (R. 234.)

Following Sage's testimony the Railroads rested. The Court ordered judgment in favor of the Railroads and against the Lumber Company because of

the Lumber Company's indemnifying agreement with the Union Pacific Railroad Company.[1]

Then the Lumber Company presented some additional evidence in the action against Bedal. Exhibit 7, the transcript in the *Powell* case, was admitted for the purpose of showing the scope of what was adjudicated in the prior action. (R. 235.) On page 236 of the transcript counsel for the Lumber Company, as well as counsel for the other parties, stipulated that L. H. Anderson, if sworn as a witness, would testify that he was counsel for the Railroad and that he had charge of the litigation in the *Powell* case, and that he would have said that if either Bedal or his insurance carrier had offered to take over the defense, or to assist Mr. Anderson, and his client, that they would have accepted such defense, or assistance, and that it was also stipulated that at no time did Mr. Anderson or the Railroad Company call on Bedal to defend that case. (R. 236.) We wish to make clear that this stipulation was made on September 22, 1953, and referred to the *Powell* case tried on February 26, 1951. (R. 135.)

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[1]The only issue tendered by the Railroads' complaint against the Lumber Company was that the lease agreement provided under certain circumstances that the Lumber Company would be liable for the Railroad's own negligence. (R. 3, 7.) The trial judge also made this clear from his comments that the lease provision constituted the sole basis for his decision. (R. 254, 255, 234, 235.) There was no basis for the Finding of Fact submitted by the Railroads that Bedal was negligent. (R. 97, 98.) Bedal asked the trial Court to amend these findings consistent with issues tendered and the evidence presented (R. 113), but the lower Court failed to do so, and Bedal has appealed from those portions of the Findings of Fact and Conclusion of Law which state Bedal was negligent (R. 117).

The Lumber Company then presented the testimony of U. R. Armstrong, who was the general manager of The Hallack and Howard Lumber Company. Armstrong identified the logging contract, Exhibit 8, and stated that the Lumber Company had nothing to do with the actual practice of unloading the logs, or loading them on the freight cars. (R. 238, 239.)

Armstrong testified that the Banks landing consisted of the roadway along on top of the hill, the incline itself, down which the logs were rolled, and the bunker. (R. 240.) The roadway was in the same place at the time Bedal entered into the contract as it was at the time of Powell's accident. As a matter of fact the same road had been there a long time before the contract was entered into. (R. 240.) This is the roadway from which logs were dumped from Bedal's trucks. On page 241, the Court sustained an objection to a question posed by counsel for Bedal on the cross examination of Armstrong which was as follows:

> "Q. And had been used for the same purpose?"

Bedal's counsel, Mr. Elam, was at that point referring to the use of the road. The Court said that the answer to the question was immaterial. Further, on page 241, the Court sustained an objection to the question,

> "Q. Is that the customary and ordinary way for unloading the logs?"

Although the trial Court would not allow these questions to be answered, it is clear from testimony of other witnesses that the road had been used for the same purposes for many years and that the logs were being unloaded in the customary way.

After Armstrong's testimony the Lumber Company rested. In a final presentation of the case, counsel for Bedal asked for a motion to dismiss the third party complaint, and counsel for the Lumber Company moved for a directed verdict. (R. 242, 245.) In a statement to the jury the Court granted the Lumber Company's motion for a directed verdict. (R. 248.) In its comments to the jury the Court pointed out that in the *Powell* case the first jury had found that Bedal was negligent in unloading the logs, though not a party, (R. 248), and that the question of whether the rolling of the logs down the hill was negligent was left in the *Powell* case to that jury and that Bedal should not now be allowed to gamble on still another jury. (R. 249, 254.) Comments of the Court on page 250, 254, 255, showed that the Court granted judgment in favor of the Railroads against the Lumber Company by reason of the indemnify agreement supposedly contained in the contract and lease between them.

Since in plaintiffs' Exhibit No. 7 the whole transcript of the prior *Powell* case was put into the record in order to determine the scope of the prior adjudication, it will be necessary to examine certain other facts appearing in that case. For example, con-

cerning the debris that was behind the bunker, though in itself not relevant in any of the actions so far as the breaking of the slab off the log is concerned, Powell testified that he had told the Union Pacific Railroad agent, Mr. Russell Eldridge, about the debris at least three times prior to the accident and stated that it created a dangerous condition. (See Exhibit 7, pp. 11, 12, 13 and 67.) Eldridge admitted that Powell did complain to him about the debris but felt he was actually concerned because the logs occasionally hit the railroad cars. (Exhibit 7, pp. 81, 85.) Eldridge also testified that logs had been going over the bunkers and hitting the cars all year long during that logging season. (p. 88.) Powell[2] also said he didn't move further north because he had

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[2]The exact testimony of Powell appearing on pages 61 and 62 of Exhibit 7 is as follows:

"Q. Yes, but I was wondering why you didn't move further to the west, you said that you were 60 feet away and I wondered why you didn't move further to be away from this stuff that would fly off these logs?

A. I never saw it go this far before this time.

Q. You were not anticipating such a thing to occur?

A. No.

Q. It hadn't ever occurred before?

A. No, not that far.

Q. All that had occurred before was the bark or a piece of the bark would fly off and go a short distance and that is the reason that you dropped over about 60 feet of where those logs would come down?

A. Sure, I would be away from where they were unloading. A log might start off that hill and go over to another direction.

Q. It wasn't an unusual operation, it was the same operation that they had been performing for a long time in dumping the logs and in the manner that they came down?

A. You mean how they came down?

Q. There wasn't anything unusual about the operation, it

never seen anything (referring to the slab) go off that far before. (Exhibit 7, p. 62.)

Powell also testified that the unloading operation was the usual dumping operation that had been going on for a long time. (Exhibit 7, p. 62.)

Powell claimed that the load of logs on the truck was 12 feet from the ground, that is, 12 feet from the top of the load to the ground, and that usually there were 8 feet of logs on the truck bed. (Exhibit 7, p. 64.)

At the end of the trial, counsel for Mr. Powell amended his complaint (See Powell transcript, page 177), since it became clear that the slab broke off the log while it was being unloaded in the usual and customary manner. The debris filled bunker had nothing to do with Powell's injury.

In its instructions to the jury in the *Powell* case the trial Court stated that the Railroad Company was required to furnish its employees with a reasonably safe place to work. The Court also instructed the jury that contributory defense was not an absolute bar, but that it could only be considered, if any was to be found, in assessing damages. Bedal's name is not mentioned in the instructions, nor was

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was the same operation that they had been performing for a long time?

Mr. Langroise. We object to that as calling for a conclusion, he can ask for and the witness can state the facts.

The Court. Yes, he may answer as to what happened.

A. It was the same operation, the same dumping operation."

any fact mentioned concerning the manner in which logs were unloaded. The only specific instruction on negligence was that the Railroad was under a duty to furnish its employees with a safe place to work. (See Instructions, Exhibit 7, pp. 182, 203.)

Since certain specific sections of the leases and contracts involved in these actions will of necessity be discussed in the argument, it is not considered necessary here to include the provisions that will be discussed at that later time.

STATEMENT OF THE CASE FOR BOTH APPEALS.

W. O. Bedal is appealing from the judgment granted by the lower Court in favor of the Railroad and against The Hallack and Howard Lumber Company, and from certain Findings of Fact and Conclusions of Law filed in support of the Judgment. Bedal is also appealing from the judgment and the order of the Court directing the jury to render a verdict in favor of The Hallack and Howard Lumber Company and against Bedal. In this later case, Bedal appeared as a third party defendant. Appeal from two judgments are involved in this case. These appeals are treated together in this brief, in so far as the JURISDICTIONAL STATEMENT, SPECIFICATIONS OF ERROR and the STATEMENT OF THE CASE are concerned. However, there are separate arguments in the brief relating to matters

peculiarly applicable to each specific appeal. Where there matters would be repetitious in both appeals if treated separately, they have been discussed in the first argument and referred to in the second argument. The first ARGUMENT deals with Bedal's appeal from the judgment rendered against him and in favor of the Lumber Company after the trial Court took the matter away from the jury by directing a verdict in the Lumber Company's favor. In the second ARGUMENT, Bedal supports his position that the judgment rendered by the trial Court in favor of the Railroad was erroneous in the first place, and subsequently, of course, the subsequent judgment in favor of the Lumber Company and against Bedal would then be erroneous.

On September 15, 1949, an employee of the Union Pacific Railroad Company, A. M. Powell, successfully sued the Railroad because of injuries he sustained when a slab from a log that was being unloaded at Banks, Idaho, struck him, while he was standing on a log bunker. The Railroad was charged with providing its employee with a safe place to work. There was nothing unusual about the logging operation conducted on the day of Powell's injury. The Railroad had full knowledge of the way it was conducted that day as it did for months and years before. Neither The Hallack and Howard Lumber Company nor W. O. Bedal were parties to that first action. W. O. Bedal was never asked by either the Railroads or by the Lumber Company to defend that

action. He was never asked to assist in it, nor in any manner to participate.

The Lumber Company is now trying to hold Bedal to all of the results of the first action by Powell against the Railroad Company as if Bedal, himself, was a party to that first action. Counsel for the Lumber Company in his motion for a directed verdict (R. 245) argued that Bedal was adjudged negligent in the *Powell* case, and that this negligence made him liable over to the Lumber Company, an innocent party. The trial Judge of the Idaho Federal District Court, the Hon. Chase A. Clark, agreed with counsel for the Lumber Company, and so stated his opinion in his charge to the jury, asking them to bring in a directed verdict. (R. 254.)

The Lumber Company was held liable to the Railroad because of a provision in its lease, which was construed by the trial Court as requiring that the Lumber Company indemnify the Railroad on account of the Railroad's own negligence. There was no evidence, whatsover, that the Lumber Company was negligent. (R. 10.) The Lumber Company, of course, since it stands in the position of an insurer or indemnitor of the Railroad Company, can only recover against Bedal if the Railroad could recover against Bedal. Bedal contends that there is no evidence in the first case tried on September 15, 1949, in which the Union Pacific Railroad Company was adjudged negligent, to charge Bedal with any kind of negligence. As a matter of fact, Bedal contends

that he is entitled to review the whole record, and to have his liability, if any, determined by a jury, and to have the liability of the Railroad to Powell retried also. Bedal could in no way be connected with the prior adjudication. He was not asked to defend by either the Railroad or the Lumber Company, and he had no opportunity to take part in the litigation. Consequently, the first case could not under any circumstances be *res judicata* against Bedal.

The Lumber Company, since it introduced the transcript of the first case (See Exh. 7) is bound by the facts adjudicated therein. The undisputed facts in the *Powell* case show that the Railroad Company had full knowledge of the method and manner of unloading logs at the Banks site. The Railroad knew precisely how logs would be unloaded and the undisputed evidence shows that the logs were unloaded at the time of Powell's injury in the same manner as they had in prior months and years. If this was a dangerous condition it was acquiesced in by the Railroad. Bedal contends that the Railroad is a joint tort-feasor as a matter of law, and as such could not recover against Bedal directly on the theory of implied indemnity. As a consequence, neither can the Lumber Company.

In addition, Bedal claims it was error for the trial Court to fail to submit the question of Bedal's negligence to the jury. Even if it were determined that the Railroad was passively negligent, still it is a question for the jury as to whether or not Bedal

was negligent and whether Bedal's negligence was the primary cause of the accident. These questions have always been held to be for the jury. Bedal, furthermore, contends that it was not necessary in the first action that his negligence be determined at all, and consequently, according to the theory of *res judicata* it would not be determined, since he was not a party, and this determination should be left to still another jury. This the trial Court refused to do.

The record in this case, together with Exhibit 7 shows conclusively that the Railroad was negligent in placing Powell in a place near what was recognized as an inherently hazardous operation that was a natural incident to the logging business. There is no evidence that the unloading operation itself was negligently conducted. Bedal had nothing to do with Powell being where he was at the time of his injury.

Although it is not the main contention of the Lumber Company, it did allege in its complaint that Bedal's contract with the Lumber Company should be construed as an indemnity agreement. This contract called for the cutting, hauling, unloading and loading of logs. Bedal was an independent contractor. Bedal claims that this agreement can in no way be considered as an agreement to indemnify. As a matter of fact, counsel in his argument to the Court, in support of its motion for a directed verdict, did not even mention the contract being one of indemnity. (R. 245, 247.) Since Bedal was not adjudged negligent in the first action, or in any action, his agree-

ment to carry liability insurance on his trucks cannot be construed to be an agreement of indemnity. Furthermore, since the Lumber Company was held responsible to the Railroad, by virtue of its indemnity agreement, and not by reason of any negligence on its part, such a provision in the logging contract of Bedal could in no sense be construed as a promise to indemnify. A reading of this long logging contract makes clear that nowhere in it are the specific words required of an indemnity agreement.

Since Bedal was asked to defend the suit by the Railroads against the Lumber Company, and since Bedal answered the complaint of the Railroads against the Lumber Company, and further, since Bedal appeared at the trial and cross-examined certain witnesses put on by the Railroad, and, of course, since Bedal's responsibility if any, rests upon a recovery by the Railroads against the Lumber Company, Bedal has appealed from the judgment of the trial Court awarding the sum of $18,334.15 to the Railroads. Bedal has also appealed from the Findings of Fact and Conclusions of Law as submitted by the Railroad (R. 92, 98), and as amended by the trial Court (R. 113). The trial Court did amend the Findings to clearly show that Bedal was an independent contractor of the Lumber Company, and not the Lumber Company's servant or agent. (R. 112.) Bedal, however, objects to the Finding of Fact that the unsafe place—referring to the logging site—was created by the negligence of Bedal, and that this

negligence was the active and primary cause for Powell's injury. (R. 113.) Bedal contends that there were no issues tendered by the Complaint of the Railroad against the Lumber Company on which such a finding could be predicated. Such a Finding was irrelevant to the action since the Court held that the Lumber Company was responsible to the Railroads by reason of its lease provision, and for no other. Furthermore, there was no evidence in that case that Bedal was negligent, or that his negligence was the primary or active cause for Powell's injuries. This finding is improper because in the first case of *A. M. Powell v. Union Pacific Railroad Company,* no such finding that Bedal was negligent could be made either.

It is clear from the pleadings, the evidence, and the statements of the trial Court (R. 254) that the Railroads were successful by reason of Section 5 of their lease agreement. (R. 10.) Section 5 of the lease agreement, (the Railroad leased a small part of its right-of-way for a consideration of $55.00 a year to the Lumber Company), provided in substance that the Lumber Company should at all times protect the Railroad from all injury or damage by reason of the occupation of the leased premises, or from any cause whatsoever growing out of lessee's use thereof. Bedal contends that this language is not sufficient as a matter of law to hold the Lumber Company, an innocent party, responsible for the negligence of the Railroads. Appellant also examines

the rule of law that such an agreement of indemnity should be strictly construed and unless it is clear from the language of the lease, a provision hinting of indemnity must be construed against the Railroad particularly where the Railroad seeks to be held harmless from its own negligence.

Appellant calls particular attention to *Booth-Kelly Lumber Company v. Southern Pacific Company,* 183 Fed. 2d 902 (9th Cir.). Bedal contends that in both of its appeals, this decision supports the position of appellant and that if the Court follows the principles set forth in the *Booth-Kelly* case, then both judgments against Bedal must be reversed. (See Appendix for a discussion of this case.) In addition Bedal contends that since the evidence shows without doubt that the Union Pacific Railroad Company was at the very least a joint tort-feasor because of its acquiescence in any condition that existed at the time of Powell's injury, the trial Court's failure to dismiss the complaint and to direct a verdict in favor of Bedal was error.

SPECIFICATIONS OF ERRORS.

1.

That the Court erred in denying the motion of third party defendant to dismiss the third party complaint.

2.

That the Court erred in sustaining and granting the motion of third party plaintiff for a directed verdict.

3.

That the Court erred in its Findings of Fact and Conclusions of Law in the following particulars:

(1) In making the following Finding of Fact:

"That the said unsafe place was created by the fault or negligence of the defendant The Hallack and Howard Lumber Company, by and through W. O. Bedal, his agents, servants or employees, and the said Union Pacific Railroad Company was guilty of no active negligence; that the active, direct, proximate and primary cause of said Powell's injuries was that of the defendant, The Hallack and Howard Lumber Company acting by and through its agent, the said W. O. Bedal, in unloading said logs in the manner and under the circumstances hereinbefore referred to."

(2) In making that portion the following Conclusion of Law:

'or independent of said lease."

4.

That the Court erred in sustaining the motion of Union Pacific Railroad Company to strike the separate defenses of third party defendant.

5.

That the Court erred in rendering judgment to Union Pacific Railroad Company.

6.

That the Court erred in rendering a judgment in favor of third party plaintiff and against Bedal for the reasons, and on the grounds as follows:

(a) There is no evidence in the record or in any of the exhibits, whatsoever, that shows that Bedal was negligent.

(b) The jury did not and could not find in the case of A. M. Powell v. Union Pacific Railroad Company that Bedal was negligent.

(c) The case of A. M. Powell v. Union Pacific Railroad Company in any event is not *res judicata* as far as Bedal is concerned because he was not given an opportunity to defend that case, or asked by any party to assist in it. Furthermore, the evidence in that case, exhibit 7, shows Bedal was not negligent.

(d) The Hallack and Howard Lumber Company, as a subrogee, stands in the same shoes as the Railroad.

(1) The undisputed testimony in the case of A. M. Powell v. Union Pacific Railroad Company shows that the Railroad acquiesced in a dangerous condition, and thus was a joint tort-feasor. The Lumber Company, too, would have no better right than the Railroad, and since there can be no recovery between joint tort-feasors, the Lumber Company could not, as a matter of law, recover from Bedal.

(e) Whether Bedal was negligent or not, and whether or not this negligence was the primary cause of the injury to Powell, was a question for the jury.

7.

That the Court erred in ruling on objections to evidence as appears in the transcript of the record as follows:

(a) The Court erred in refusing to allow the Lumber Company's witness, U. R. Armstrong, to testify that the roadway above the Banks logging site had been used for the purpose of unloading logs for a long time prior to Powell's injury, and that the method of unloading the logs on the day of his injury was the customary and ordinary way for doing that kind of work. (R. 240, 241.)

(b) The specific questions objected to and held to be immaterial by the trial Court are as follows:

> "Q. And had been used for that same purpose?
>
> (The question is referring to the use of the road.)
>
> Q. And there was no other road there from which to unload these logs?" (R. 241.)

> "Q. Is that the customary and ordinary way for unloading the logs?"

(c) Bedal specifies that the failure of the Court to allow Armstrong to answer these questions was error because the answer would further establish and support other evidence that the Railroad knew of

conditions that existed at the time Powell was injured, and if those conditions were dangerous, acquiesced in them.

ARGUMENT I.

A PERSON IS NOT BOUND BY A JUDGMENT TO WHICH HE IS NOT A PARTY, NOR PRIVITY TO A PARTY, AGAINST WHOM THE JUDGMENT WAS RENDERED, OR IN FAVOR OF WHOM THE JUDGMENT WAS RENDERED, UNLESS THE ORIGINAL JUDGMENT WAS AGAINST THE INDEMNITEE, AND THE INDEMNITOR WAS NOTIFIED OF THE SUIT AND GIVEN AN OPPORTUNITY TO DEFEND IT.

The trial Court directed a verdict in favor of The Hallack and Howard Lumber Company, and against W. O. Bedal, the third party defendant. The trial Court in its statement to the jury pointed out that in its opinion Bedal was adjudged negligent in an action between A. M. Powell and the Union Pacific Railroad Company.[3] In the trial Court's opinion W. O. Bedal was adjudged negligent in the Powell case, and the Court held that this negligence was responsible for the later judgment against The Hallack and Howard Lumber Company. The Railroads recovered a judgment against the Lumber Company, because the Lumber Company in its lease agreement contracted to indemnify the Railroads on account of any damages, judgments, etc., which the Railroad might have entered against them by virtue of the occupation of the leased premises. (R. 10.)

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[3]This case was tried in front of a jury on September 15, 1949.

Appellants feel that a great many questions of law and facts have been raised in this appeal. We feel that every single one of them is important, and merits the full consideration of the Court. On each of the grounds we will mention we believe that the many errors committed by the trial Court are reversable errors, and that the judgment of the Court against Bedal should be set aside as well as the judgment entered against the Lumber Company.

A stranger to a lawsuit cannot be bound by the results of action to which he is not a party. It is the firm contention of Bedal that not only is he not bound by any of the facts adjudicated in the action of A. M. Powell v. Union Pacific Railroad Company, but that he is entitled to retry every single issue presented in that case. He is entitled to retry the question of whether or not Powell should have recovered a judgment against the railroads in the first place, and whether the Railroads were negligent or not. He is entitled to retry the question of whether or not Powell was contributorily negligent, or had assumed the risk of his employment.

The Hallack and Howard Lumber Company in their complaint, (R. 19), allege that Bedal is the indemnitor of the Lumber Company. In its first count the Lumber Company states that Bedal was liable to the Lumber Company because of an express indemnity agreement. Secondly the Lumber Company claims (and this is the real charge in their complaint upon which they rely) that Bedal is liable because of

an implied indemnity agreement. By implied indemnity agreement the Lumber Company means that Bedal's negligence was the primary cause of Powell's injury. The Railroad's negligence was passive. The Lumber Company, having paid the Railroad, would stand in its shoes and therefore could assert the Railroad's right against Bedal as though it were a subrogee.

Regardless of the theory of indemnity which we will discuss later, the question still remains to what extent is Bedal bound by the original lawsuit. Appellants will make an effort to examine cases which fundamentally set forth the principles of *res judicata,* and further to apply the rule in these cases to the facts at hand. Bedal feels that the conclusion is inescapable, that it could not, and is not, bound by the prior judgment rendered in favor of Powell. It is well settled, of course, that the doctrine of *res judicata* does not operate to affect strangers to a judgment. *In re Sharp,* 15 Idaho, 120, 96 Pac. 563; 30 Am. Jur. Sec. 220. This of course is a common sense rule. To make another person liable for a judgment rendered in a separate independent action, without the right of examination or cross-examination, without the right to introduce evidence, or the right to appeal, would make such person liable for a judgment and for all the effects of a judgment without an opportunity to have his day in Court. This, of course, is contrary to our American theory of jurisprudence.

There have been several extensions and refinements of the doctrine of *res judicata.* It is held, for example, that a person in privity with a person who is a party to an action, is bound by the results of that action as if he, too, were present. For example, a person who controls an action, and has a financial stake in the actual trying of the case, or a person whose interests are represented by a fiduciary, or by an entity or corporation of which he is a part, or a transferee from a party to the action, are all held to be what is known as "in privity" to one another. The question of privity and who is bound in a lawsuit, and what is *res judicata,* has been examined by Warren A. Seavey, in his article in the Harvard Law Review, entitled "Res Judicata. Reference to Persons neither Parties nor Privities". Harvard Law Review, Vol. 51, 1943, page 100.

It is also said that the only time that a prior judgment will bind even the same parties to the action is where the issues in a later suit are identical and where there is mutuality between the parties. Nevertheless the doctrine has gone one step further, but only one step further. It has been extended to a situation where the same issues are being tried, and the party who brings the second action against a different party, was unsuccessful in the first action. The new parties can successfully *defend* on the ground of *res judicata,* but if in the first action the plaintiff was *successful* and then later sued a new and entirely different party on the identical issues, then he,

the plaintiff, cannot insist on the doctrine of *res judicata* as binding the new defendant. Here the Courts say that there was a lack of privity between the parties, and the defense of *res judicata* is unavailable in the plaintiff's favor. See Comment, Yale Law Journal, 35 Y.L.J. 607, March, 1926.

An example of the latter principle is contained in *American Surety Company v. Singer Sewing Machine Co.,* 18 Fed. Sup. 750, 753, in which the New York District Court states as follows:

> "In the proceedings which the Baldwins took against the surety company in Idaho, it was decided that the bond covered Anderson, as well as the Singer Company. The judgment that the surety company was finally compelled to pay was an adjudication by due process of law in favor of the Baldwins and against the surety company, to the effect that the bond constituted an agreement to pay if the appeal went against Anderson. While the Singer Company was not a party to that suit, the facts there adjudicated against the surety company are conclusive against it when it seeks to compel the Singer Company to respond to the loss sustained in that suit."

In this case the American Surety Company, as plaintiff, was suing the principal on its bond. The plaintiff had earlier allowed what amounted to a default judgment to be taken against it. The Court felt that since this was the case, the Singer Company could not be responsible on its indemnity agreement.

The surety company was not allowed to take advantage of its own mistake.

But an entirely different situation arises where an indemnitor is sued and he is not a party to the prior suit, nor given an opportunity to defend a prior suit from which it is claimed the liability of the indemnitee arose. In this respect it is interesting to examine the applicable Restatements, both of Judgments and Restitutions, that would be applicable to this case.

Restatement of the Law of Judgments, Sec. 107, provides as follows:

> "RIGHTS OF INDEMNITEE AND INDEMNITOR INTER-SE AFTER JUDGMENT AGAINST ONE OF THEM.
>
> In an action for indemnity between two persons who stand in such relation to each other that one of them has a duty of indemnifying the other upon a claim by a third person, if the third person has obtained a valid judgment on this claim in a separate action against
>
> (a) The indemnitee, both are bound as to the existence and extent of the liabilty of the indemnitee, if the indemnitee gave to the indemnitor reasonable notice of the action and requested him to defend it or to participate in the defense."

The Court will note that in the body of this Restatement which would be applicable to this case, the editors only contemplate an action in which the indemnitee himself was actually a party to the prior

suit. The Hallack and Howard Lumber Company was not a party to the prior suit. (A. M. Powell v. Union Pacific Railroad Company.)

In many cases, too, even where the indemnitee is a party to the first suit, the indemnitor may be under no duty to defend the first action, and of course would not be bound by it unless he were. For example on page 513 on the above Restatement, paragraph 3, there is a comment on clause (a), which states as follows:

> "Where a person is under a duty to another to indemnify the other against losses suffered as a result of a breach of contract or for a tort, the indemnitor is entitled to a trial to determine whether his liability has come into existence. He may or may not be under a duty to the indemnitee to defend the action against the latter, and if he is under no such duty he commits no breach by failing to defend. In this event he is entitled, in the subsequent action against him for indemnity, *to show that the indemnitee was not subject to liability and hence not entitled to indemnity.*" (Italics ours.)

Subsection (a) of Restatement of Judgments, 107, points out that the indemnitor is bound as to the existence and extent of liability if the indemnitee gave the indemnitor reasonable notice of the action and requested him to participate in the defense. See Comment E of Restatement of Judgments, 107. In this Comment the following paragraph is inserted by the editors:

> "There must also be a tender of control either joint or full. In order to bind the indemnitor in a subsequent action against it, the indemnitee is not obliged necessarily to surrender the entire control of the defense; he must, however, request the indemnitor to participate, and if the judgment is given against the indemnitee, he must permit the indemnitor to take appellant proceedings."

Appellants think it clear that the editor of Restatement of Judgments had in mind in Section 107, that in order for an indemnitor to be bound at all, the indemnitee must be a party to the first action. This certainly is true where the indemnitee Lumber Company is not even a party to the first action and did not, and coud not, give Bedal, the alleged indemnitor, an opportunity to defend the former litigation.

We have only to examine the facts to show that Bedal could not be bound in the first action. The injured party, Powell, an employee of the Union Pacific Railroad Company, sued only the Union Pacific Railroad Company. (R. 128.) It was only against the Union Pacific Railroad Company that Powell obtained a judgment. (R. 135.) The Lumber Company was not a party to that lawsuit nor was it a party to the judgment. The Railroad in turn sued the Lumber Company *after* rendition of judgment against it in order to recover on the basis of its express agreement.[4]

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[4]Bedal will point out later on in this brief that we feel the Court was in error in construing this indemnity agreement in favor of the Railroad Company.

In its complaint against the Lumber Company, (R. 3), the Railroad nowhere specifically states that it was recovering or sought recovery from the Lumber Company because of its negligence. The only sentence in the whole complaint that could be otherwise construed, and this would be stretching the import of plain words, is that the Lumber Company was liable because of its lease, or "independent of said lease" to the Railroad. he word "negligent" or "proximate cause", or "primary" or "secondary" negligence was never mentioned once in the complaint of the Railroads. Further the evidence clearly shows that the Lumber Company was not present either at the time the logs were unloaded, nor at any other times relevant to this action. Bedal was an independent contractor, as the Lumber Company itself alleged in its complaint against Bedal. (R. 21.) In its Findings of Fact and Conclusions of Law submitted by the Railroad, and signed by the trial Court, it should be noted on page 98 of the record that the Railroads did not contend in their conclusions of law that the Hallack and Howard Lumber Company was negligent. The Railroads did include in paragraph 11 of its Findings of Fact that the unsafe place where Powell was injured was the fault of the Lumber Company, "its agents, servants and employees," and the further finding that the Railroad Company was not guilty of active negligence. The Lumber Company objected to the Finding of Fact that it was the *employer* of Bedal. The trial Court sustained the objections of the Lumber Company and the Findings

of Fact and Conclusions of Law were amended to show that Bedal was an independent contractor.[5] Thus it becomes clear, not only from the evidence which dictates the result, but from the Findings of Fact and Conclusions of Law signed by the trial Court, that the reason why the Lumber Company was held responsible for the judgment against the Railroad in the Powell case was the simple fact that the Court felt the Lumber Company had expressly indemnified the Railroad against its own negligence in its lease with the Railroads.[6]

(Appellant would like to mention the general principle of law that a principal is not liable for the negligent acts of an independent contractor. This is such a common principle that appellant does not think it necessary to do other than refer to it. 27 Am. Jr. 504, Sec. 27.)

The Lumber Company was cognizant of the fact that in order to bind Bedal by a prior judgment there would have to be something additional pleaded in its first complaint. Consequently, the Lumber

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[5]Order of the trial Court dated September 25, 1953. (R. 113.)

[6]The Findings of Fact and Conclusions of Law in support of the Railroads' judgment against the Lumber Company did infer in paragraph XI that Bedal was negligent and his negligence was the primary cause of Powell's injury. (R. 97, 98.) The trial Court did not act on Bedal's motion to amend these findings (R. 113), and Bedal has appealed from them. The trial Court felt that Bedal was adjudged negligent in the *Powell* case. That this Conclusion was error we argue here. There can be no question, though, that such a Finding in the Railroads' action against the Lumber Company was outside of the issues tendered in that case and was not the basis for the trial Court's judgment in the Railroads' favor. (R. 254, 255, 235.)

Company amended its third party complaint and attached a letter addressed to Bedal and dated January 10, 1951. This letter was introduced as Exhibit No. F. (R. 64.) It is clear from a reading of this letter that the Lumber Company was merely advising Bedal and its insurance carrier on January 10, 1951, that it would look to Bedal in the event it was eventually held responsible for any judgment Powell might receive against the Railroad Company. Nowhere in this letter is there a statement that the Lumber Company tendered the defense of the Powell case to Bedal. Nowhere is there a request that Bedal enter that lawsuit. This letter is nothing more than a statement that the Lumber Company will hold Bedal and his carrier responsible for any ultimate liability that might or might not attach to the Lumber Company. This letter was written by a Company not even a party to the lawsuit. Can such a letter, can such a failure to tender a defense, can indeed such a set of circumstances, bind the appellant to a lawsuit to which he could not be, and was not, a party? It makes no difference that counsel for the Railroad would testify two and one half years after the Powell case was tried that had Bedal or his insurance carrier offered to take on the defense of the Powell case that the Railroad would not have objected. (Counsel stipulated that L. H. Anderson would so testify on September 22, 1953, R. 236.) Anderson's testimony not only came two and one half years late, but from it the Lumber Company wants the Court to draw the inference that the silent belief

of the Railroad would take the place of notice and a request to defend. The statement in the stipulation, however, that must bind the Lumber Company is that neither counsel for the Railroad Company, nor the Railroad Company at any time called upon Bedal to defend that case. (R. 236.) With these facts in mind, the leading cases on this subject should be examined and compared to the situation presented to this Court.

One of the leading cases in which the law of implied indemnity and the principles of *res judicata* connected therewith are discussed and applied is the case of *Washington Gas Light Company v. the District of Columbia,* 161 U. S. 316, 40 L. ed. 712. There the Supreme Court of the United States was considering an appeal as the Supreme Court of the District of Columbia. The Washington Gas Light Company was the defendant and was being sued by the District of Columbia on the theory of implied indemnity. Prior to the lawsuit, from which the Washington Gas Light Company had appealed, a woman by the name of Parker had fallen because of a hole in a sidewalk, been injured, and had successfully sued the District of Columbia. The hole in the sidewalk was created by a defectively installed gas box. The gas light company was in charge of the installation. At the time that Parker made a demand for recompense on the District of Columbia, the District in turn made a demand on the gas company to hold it harmless. Later, when Parker sued the District of Columbia, the latter asked the Gas company to hold it harmless, defend the case, and to participate in it. This the Gas Company refused

to do. Parker recovered a verdict against the District of Columbia and it in turn sued the Washington Gas Light Company. The District recovered a verdict after a trial in the lower Court. It is in this case, so often quoted, in which the Supreme Court of the United States re-emphasized the general rule and the rule applicable to cases of implied indemnity ever since. The Court held in substance that a person who has become liable in tort to another because of an injury caused by his negligent failure to protect the other from the tortious conduct of a third person is entitled to indemnity from such third person for expenditures properly made in the discharge of that liability, if the payor could have recovered from a third person for injury so caused to himself or to his own property. Restatement of the Law of Restitution, Sec. 94, p. 413. However, before a *prior* judgment can bind the defendant in a later suit by an alleged indemnitee, and before every fact in the prior suit is conclusive against the one sued, he must be given proper notice and a full opportunity afforded him to defend the first action. The Supreme Court made this clear in its opinion on page 329 of the United States Reports. The Supreme Court pointed out that once a person, an implied indemnitor, is duly notified and given an opportunty to come in and defend a lawsuit by the party against whom a claim is being made, he is no longer a stranger to that suit and he has the same "means and advantages of controverting the claim as if he were the real and nominal party upon the record."

The Court should compare the general rule elicited in *Washington Gas Light Company v. District of Columbia,* supra, to the facts in our case. Appellant feels that there is no question but what it was not afforded an opportunity to defend the Powell lawsuit as a matter of law. It was not asked to defend the claim of Powell against the Railroad. Bedal was not asked to take part in the trial. The Railroad Company, the defendant in the Powell lawsuit, did not and has never asserted a claim against Bedal. Under these circumstances, certainly, Bedal could not be bound by any single fact litigated in the original proceeding. Even the Lumber Company did not ask Bedal to defend the first suit nor did it have a right to do so.

There are numerous cases in which the general rule has been stated that before a judgment is binding on an alleged indemnitor, he must be given full notice and an opportunity to defend. See 42 Cor. Jur. Secundum, Sec. 32, (2), Sub-Sec. (c), p. 617.

United States Fidelity & Guaranty Co. v. Dawson Produce Co., 68 P. 2d 105 (Okla.);

30 Amer. Jur. 970, sec. 238;

Inashima v. Wardall, 224 P. 379, 128 Wash. 617;

Southwestern Railway Co. v. Acme Fast Freight, 19 S.E. 2d 286;

City of Lewiston v. Isaman, 19 Ida. 653, 115 P. 494;

Seattle v. Northern Pacific Railroad Company, 92 P. 411 (Wash.).

Nor it is sufficient that the indemnitor had actual notice, acquired independently, of the pendency of an original lawsuit to which he is neither a party nor a privity, if he was not formally noticed in to defend and *PARTICIPATE* in the proceedings by the *original party defendant,* who later claimed to be an indemnitee.

Burchett v. Blackburne, 248 S. W. 853.
Cases annotated in 34 A.L.R. 1429.

An example of the failure or inability to properly notify and bring in an indemnitor, and the results of such failure can be seen from the recent case of *Crawford v. Pope and Talbot, Inc., et al.*, 206 Fed. 2d 784, Third Circuit, 1953. In this case Pope and Talbot owned a ship. The National Boiler Cleaning Company contracted to clean out the tanks in the ship. An employee of National was injured in these tanks because of the unseaworthiness of the ship. The employee sued Pope and Talbot, the owners—who owed a non-delegable duty to make the premises safe for the employee, and Pope and Talbot cross complained against National and asked the lower court to bring National in as a third party defendant, claiming it was ultimately responsible for the injury to its own employee. The Federal District Court below took the view under National's pleading that it could not be held responsible because the original suit against Talbot was by National's own employee and consequently National would have the defense of the Longshoremen and Harbor Workmen's Compensation Act,

it being the exclusive remedy, 33 U.S.C.A. Sec. 901, et seq. However, the Court of Appeals for the Third Circuit held that the lower court's motion to dismiss National was erroneous since the defense of the Compensation Act did not apply between National and Talbot. The Circuit Court then was confronted with the effect of the prior suit by the employee against Talbot. On page 794 the Court pointed out the critical questions that it had to decide:

> "When will the Court in the indemnity litigation permit the parties to re-examine all the facts with the possible result that the original judgment is found wrong, thus leaving the indemnitee with nothing from which he can properly claim indemnity? And when will the Court consider the indemnitee and the indemnitor bound by the finding made in establishing the original judgment?
>
> "The general rule is clear. A person not a party to a case is not bound by the findings in that case in subsequent litigations involving the same facts situation. Where the subsequent litigation involved one of the same parties to the original case, even that party is not bound since his adversary, the new party, is not."

The Third Circuit Court held that National was under no duty to participate in the defense of the original action because the trial Court had dismissed it, even though mistakenly. That was true, even though Pope and Talbot had requested and demanded that National defend and hold it harmless in the ori-

inal suit. We think this case is important, and would like to quote the following:

> "We conclude that the answers to the questions posed above are as follows: If the indemnitor was not a party to the original action against the indemnitee, and where he was under no duty to participate in the defense of the original action, or where, being under such a duty, he was not given reasonable notice of the action, and requested to defend, neither the indemnitor nor the indemnitee is bound in subsequent litigation between them by findings made in the original action, where, on the other hand, the indemnitee and the indemnitor are co-defendants, actively participating in the defense of the original action, or where the indemnitor, with notice of the action, and of the indemnitee's request that he defend it, does not participate in the defense, but leaves it to the reasonable efforts of the indemnitee, then in subsequent litigation between them, both the indemnitor and indemnitee are bound under the findings necessary to a judgment in the action."

> "In the instant case there can be no question but what Pope and Talbot notified National of Crawford's and Lucibello's action against it by endeavoring to interplead National as a third party defendant. However, National took the position that under the Longshoremen's and Harbor Workers' Compensation Act, it could not be sued for contribution or indemnity. Although this view was mistaken as to the indemnity claim, the Court below sustained it and prior to the trial dismissed the petition to inplead National. National, therefore, so far as it could know, was

> under no duty to participate in the defense of the actions against Pope and Talbot. We conclude that National cannot be bound by any of the findings made in the litigations between Crawford and Lucibello, and Pope and Talbot. Compare the strikingly similar situations in George A. Fuller Co. v. Otis Elevator Company, supra. (This case is 245 U.S. 489.) Should Pope and Talbot now press its claim for indemnity against National it will be open to National to establish that Pope and Talbot was erroneously held liable to Crawford and Lucibello, and that therefore Pope and Talbot may not claim indemnity from this judgment. We think it must follow that if National is free to relitigate all of the facts of the situation at bar, Pope and Talbot cannot be bound by these present findings as to these same facts."

Certainly in this case, too, Bedal would be free to relitigate all of the facts in the case, and submit those facts to a jury. This the trial court refused to do. (It should be pointed out that in the above case the Third Circuit Court followed the rules set forth in the Restatement of the Law of Judgments, Sec. 106, 107 (a), and particularly Comment 3 of the Re-Statement.)

Bedal affirmatively contends that the trial Court was in error in directing a verdict in favor of the Lumber Company. Bedal had the right to have the following questions submitted to the Jury:

1. Whether or not Powell should recover a verdict against the Union Pacific Railroad Company based upon the Railroad Company's negligence.

2. Assuming that the Railroad Company was negligent, were the facts submitted in the suit by the Lumber Company against Bedal such as to show that Bedal, too, was negligent, and that his negligence was a concurring and proximate cause of Powell's injury?

3. If the jury did hold that Bedal's negligence was a concurring and proximate cause, was the Union Pacific Railroad Company a tort-feasor, which would preclude it from contribution from Bedal, and in turn its subrogee, the Lumber Company, from such contribution?

4. Assuming that the Union Pacific Railroad Company was not a concurrent or joint tort feasor, nevertheless was Bedal the party primarily negligent as opposed to the Railroad's "passive" negligence?

All of these questions were questions that Bedal had a right to have a jury answer.

After all, before an indemnitor can be bound by a prior judgment, to which it was not a party, the indemnitee must show that the indemnitor had a real, and not a fictitious opportunity to appear and defend the prior lawsuit. The indemnitor would have the right to conduct the whole litigation, the right to appeal, and the right to prosecute a defense without the interference of any party to the lawsuit. This the Lumber Company could not give Bedal, because it did not have those rights to give away. See *Robb v. Security Trust Company,* 121 Fed. 460, Third Circuit.

Appellant would also like to call attention of the Court to: *Cofax Corporation v. Minnesota Mining and Manufacturing Co.,* 79 Fed. Sup. 842 (S. D. N. Y.) 1947.

Section 96, Restatement of the Law of Judgments, Sub-Section 2.[7]

The *Cofax* case illustrates the close relationship that may exist between parties, and still not bind them to a judgment to which one of them was not a party. No such relationship exists in the case at hand.

BEDAL'S NEGLIGENCE, IF ANY, WAS NOT IN ISSUE IN THE POWELL CASE NOR WAS IT PASSED UPON.

Actually, even if Bedal was given notice, and an opportunity to defend, still Bedal could only be bound by the facts *actually* litigated in the first case.

42 Corpus Juris Secundum, Sec. 32, Comment (c), page 617, states the general rule as follows:

> "The former adjudication is not conclusive as to the indemnitor's liability, unless such fact was necessarily involved in the issues and litigated and determined in the former action, * * *."

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[7] "A person who is not a party to an action, who is not represented in it, and who does not participate in it, is entitled to an opportunity to litigate its rights and liabilities. Where an action is brought first against the one secondarily liable there is ordinarily no reason for an exception to the ordinary rule of mutuality, and hence, since it is clear that the person primarily liable should not be bound by an action in which he does not participate, and in which he is not represented, there is ordinarily no reason for binding the unsuccessful claimant in the subsequent action." (Section 96(2), Restatement, Judgments.

So even assuming that all of the proper requisites had been given, what was adjudicated in the former action? Before we answer this question, Bedal thinks it important to re-examine once again the case of *Washington Gas Light Company v. District of Columbia,* supra. It will be recalled in that case that the Gaslight Company was being sued by the District of Columbia on the theory of primary negligence, after the District had responded in judgment to a woman by the name of Parker, who fell in a hole in the sidewalk, created by the gas company. The Supreme Court pointed out that in examining the records of the first case, there was no evidence that the District of Columbia had actual notice of the defective condition, but that this liability rested on the fact that since the defect existed over some period of time, the city had constructive notice of its existence. This would mean that the city was certainly a passive wrongdoer. In the first litigation the gas company's negligence was also at issue, since it was necessary to show that the gas company created the defective condition. The Circuit Court distinguished this case from an earlier decision. *Chicago v. Robbins,* 67 U.S. 298, 17 L.Ed. 298. In the latter case there was a similar defect in a street, but there the City of Chicago had actual instead of implied notice of the defect and as the Supreme Court said in the *Gaslight* case "that in that case (*Chicago v. Robbins*), the liability of the city rested on actual notice of the defect in the street, and not on implied negligence based on the continued existence of the

defect which caused the injury; therefore, the essential fact upon which the judgment against the city rested did not, as a legal consequence, imply negligence on the part of Robbins. Here, of course, a different set of facts give rise to a different result."

Thus in the former case of *Chicago v. Robbins* supra a question for the jury was presented and that was whether or not Robbins, the supposed indemnitor, was negligent. Certainly, in examining the transcript in the *Powell* case, one must come to the inescapable conclusion that the Railroad could be and in fact was adjudged negligent on the basis of facts in that case that would not involve a determination of Bedal's negligence at all.

In the original case of A. M. Powell v. Union Pacific Railroad Company therew as no evidence presented whatsoever that any employee of Bedal, or Bedal himself, was negligent in cutting the logs in the forest, or negligent in the loading of them on the truck, or negligent in driving the truck to the place where they were dumped. There was no evidence in the case whatsoever that the logs were dumped precariously or in a manner in which they had previously not been handled or in a manner different from logging operations generally. The only evidence that existed in that case concerning Powell's accident was that as the logs tumbled from the truck down a steep incline to the bunker, a slab flew off the log. An accident occurred. The affirmative evidence shows, from every witness, including Powell himself, that such a

thing had never happened before. (See R. 206, 218, and p. 62 of the original Transcript, Exhibit 7.)

It is clear from the examination of both Exhibit 7 and the record in this case that the logs were being unloaded exactly the same way as they had been for months and years before. (P. 62 of Exhibit 7; R. 205, 207, 208, 218 and 231.)

Unquestionably the Union Pacific Railroad Company had *actual* knowledge of the way the logs were being unloaded. Thus the issue framed in the first case was whether or not considering the facts that logs were being unloaded, did the Union Pacific Railroad Company provide its employee, Powell, with a safe place to work. The question of Bedal's negligence was not and could not be at issue. Furthermore, as we will point out later, there is no evidence whatsoever to show that Bedal was negligent, even in the first case. Consequently, Bedal had a right to submit the question of his negligence to the jury, even assuming he was bound by the first case, which he was not. The Supreme Court of the United States, in the two cases just discussed, made this distinction, and pointed out that where independent grounds of negligence existed against the indemnitee, the indemnitor was allowed to show that his actions were not responsible for the original injury complained of.

THE EVIDENCE IN THIS CASE CONCLUSIVELY SHOWS THAT BEDAL WAS NOT NEGLIGENT, AND FURTHER THAT THE UNION PACIFIC RAILROAD COMPANY'S NEGLIGENCE, IF ANY, WAS ACTIVE NEGLIGENCE, AND WAS THE SOLE AND PROXIMATE CAUSE FOR POWELL'S INJURY.

The trial Court erred in failing to grant appellant's motion to dismiss the third party complaint and to direct the jury to return a verdict in his favor. (R. 242.)

Bedal would like at this time to examine briefly the evidence in the case. Bedal will examine not only the testimony adduced in the action between the Lumber Company and Bedal, but also the testimony established in the case of Powell v. Union Pacific Railroad Company. (Lumber Company's Exhibit No. 7.) The testimony conclusively shows that if there was negligence, the only negligence that existed, or could be found, was that of the Union Pacific Railroad Company.

In the original action Powell established that the bunkers were filled with debris, causing logs that were rolled down the hill to jump over the bunker, and on occasions strike the railroad cars. But it became clear from the testimony that the fact debris existed in the bunker had absolutely nothing to do with the slab breaking off the log. The only people who saw the slab break off the log testified that it broke as the log was rolling down the hill and the slab came off prior to the time the log had reached the bunker. (R. 217, 221, 226, 231, 232.)

Even in the Findings of Fact and Conclusions of Law, (R. 92), submitted by the Railroad Company,

it is not contended that the debris in the bunker had anything to do with the slab breaking off the log. The Court itself recognized this in its statement to the jury, directing a verdict in favor of the Lumber Company. (R. 249.)

From the evidence adduced at both trials we feel that the trial Court's comments to the jury (pp. 248, 255), have no foundation in fact. We would like to take these points up in order:

There was no evidence that Bedal was negligent in handling his logs. This evidence was not presented in the first case and was not at issue. There were no instructions submitted in the first case which asked the jury to find that Bedal was negligent in unloading logs. (See Instruction, Plaintiff's Exhibit 7, p. 182, et seq.) The only evidence that appears in that case, or this one, is that the Lumber Company had been unloading the logs in this manner for a long time prior to the accident of September 15, 1949.

The trial Court claimed in its charge to the jury that the logs were rolled down a steep incline, a distance of 20 feet or more. The evidence in the cases show that the distance was more than 20 feet, in fact a distance of 47 feet. (R. 164.) Also the height of the roadway from which the logs were dumped above the railroad track was 18.7 feet. (R. 172.) The logs that were being unloaded was an average load of logs. (Plaintiff's Exhibit 7, page 55.) The distance from the top of the logs on the bed of the truck to the bottom of the wheels of the truck from which the logs

obviously would have to fall in any location was a total distance of 12 feet. (Plaintiff's Exhibit 7, page 64; R. 232.) The logs when they were pushed off the truck with a caterpillar tractor, hit the ground with considerable force, and rolled down the hill to the bunker. Powell and three other employees always went north of where the logs were being unloaded to avoid being hit by bark and to be in a safe place. (R. 216, 184; p. 62 of Cross-complainant's Exhibit 7; p. 73 of the same Exhibit.) None of these facts create an inference of negligence against anyone.

The Judge did not, as he stated, submit in the first case the question of whether or not it was negligent to unload the logs down the steep incline, but submitted, rather, the question of whether the Railroad Company provided Powell with a safe place to work. (R. 249, Cross-complainant's Exhibit 7, p. 186, 187.)

As pointed out before in this brief, the undisputable evidence is that a slab of this kind, a piece of timber such as this, weighing 60 or 70 pounds, had never been known to have broken off a log and traveled that distance before.

It was under these facts that the trial Court says that Bedal had to be adjudged negligent in the first action. We feel just the opposite. We feel these facts are not sufficient to show that Bedal was negligent at all in any action. What may we ask the Court could Bedal have done that he did not do? Wherein did his negligence lie? What was unreasonable about the method in which the logs were unloaded? There is no

evidence that the logs were unloaded in a manner not consistent with normal logging operations. Certainly there is always going to be a certain amount of risk in any logging operation when logs the size of these are loaded and unloaded. There is not even any evidence contained in either the record or cross-complainant's Exhibit 7 that any of Bedal's employees handling the actual unloading process knew that Powell was within 60 or 70 feet of the place of unloading, or knew that there was a splinter in the load, or had reason to know that a slab might fly off. There was no evidence in the *Powell* case, or this one, of that fact, because there was no need to present that evidence. The Railroad Company was adjudged negligent in failing to provide a safe place to work. After all, the Railroad had sole control over its employee, Powell. There is no evidence that Bedal had any, or that he could tell Powell where to be, or where not to be. Perfectly normal operations can create danger to people if they get in the way of these operations. For example, it would be dangerous to stand right below these logs as they were being unloaded, or it would be dangerous to look into a dynamite hole when a dynamite cap was being exploded. Any number of situations can be dangerous. If there was any negligence at all, and this too, we honestly doubt, it was in the Railroads failing to have someone available to tell Powell to get further down the track, or to provide a safe place for people to stand while these logs were being unloaded, and be protected under such circumstances. Thus, we

say that from the evidence presented it conclusively shows that under no stretch of the imagination does one scintilla of evidence appear that Bedal was negligent. And as a result, the motion for a directed verdict for appellant should have been granted by the trial Court.

SINCE THE RAILROAD ACQUIESCED IN THE MANNER THE LOGS WERE UNLOADED, IT WAS A JOINT TORT-FEASOR AND THERE CAN BE NO CONTRIBUTION OR INDEMNITY BETWEEN JOINT TORT-FEASORS OR THEIR SUBROGEES.

If the act of unloading logs was dangerous, the Railroad most certainly knew it, and acquiesced in it. Powell himself stated in the first action that the logging operation had been performed that way for a long time. (Cross complainant's Exhibit 7, p. 62.) The Lumber Company employee, Howard Sage, stated that he had watched this kind of unloading hundreds of times, and "I had never noticed anything like this, no, sir." (R. 231.) Charles Ritter said logs were handled the same way prior to the accident. (R. 218.) Harry Hansen said that the logging operation was the same method of unloading that had been employed since May, 1949. (R. 208. Also see R. 207.) U. R. Armstrong testified that Banks Landing consisted of the hill, a road on top, and that this topography had existed for a long time *prior* to the time the contract with Bedal was entered into. (R. 240.) There can be no question but what the Railroad had actual notice of the method of unloading logs. Both its car inspector, Powell, and Russell Eldridge, the Station

Agent for the Railroad at Banks, Idaho, were thoroughly familiar with the method of unloading.

Russell Eldridge used to go down by the track where the unloading was done about once a day. He testified he was conversant with the bunkers. He testified that the debris and material filled up behind the bunkers every year. (Pp. 80, 87 plaintiff's Exhibit No. 7.)

If this situation was dangerous to the Railroad's employees it was wholly within the province of the Railroad Company to correct. There was nothing hidden about the fact that logs were rolling down a hill. What happened every day at Banks, Idaho, was something quite different from the multitude of happenings in which a passive wrongdoer is in the end absolved from all blame. The cases which the respondent will undoubtedly rely upon are those cases in which a city, for example, recovers from a contractor because of a hidden defect in its streets or on its sidewalks. This was the situation in the *Washington Gaslight Company v. District of Columbia,* supra. There the city had actual knowledge of the hole in the sidewalk. How different it is then when the one adjudged negligent by a jury has full knowledge day by day of all of the surrounding circumstances which eventually resulted in injury to Powell.[8]

Apparently, the only person of all of those men waiting for the logs to be dumped that was *not* watch-

[8]Though Bedal must admit that even the evidence of negligence against the Railroad was negligible at most.

ing the unloading operation was Powell himself. But assuming there was negligence, as the prior jury must have assumed, then the negligence had to be that of the Railroad in not giving Powell and not requiring Powell to be in a safe place while he was working. Knowing what it did know about the unloading operation, the Railroad Company actively participated in the injury sustained by Powell. There is absolutely no evidence to the contrary, either in the record before this Court or in the transcript submitted by cross-complainant, to show that the Railroad did not know of the situation that existed at the time Powell was injured. Every single item and every event that occurred on the day of the Powell injury occurred on the day before and the day before that for months past. If a Court could conclude from the evidence that Bedal's method of unloading was dangerous then most certainly the least that the railroad did was to acquiesce in it.[9] By acquiescing in it, it became an active wrongdoer. An active wrongdoer who is adjudged negligent has no right of contribution from another. Since the Lumber Company indemnified the Railroad by reason of its contract to hold the Railroad harmless even for its own negligence, it being the insurer, can stand in no better position than the Railroad, its insured.[10] Bedal contends then as a mat-

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[9]Powell alleged in his complaint that the Railroad had actual knowledge of the manner in which the logs were unloaded. (R. 129, para. IV.)

[10]Bedal would not be bound by the judgment against Powell, since he did not have notice, nor was he a party to that action,

ter of law that the Railroad Company was an active joint tort feasor and could not recover against Bedal directly. Since the Railroad could not do so, neither can the Lumber Company.

The Restatement of the Law of Restitution, Section 102, Chapter 3, Page 429, provides as follows:

> "Where two persons acting independently or jointly, have negligently injured a third person or his property for which injury both became liable in tort to the person, one of them who has made expenditures in the discharge of their liability is not entitled to contribution from the other."

Taylor v. J. A. Jones Construction Co., 141 SE 492 (N.C.) (1928);

Massachusetts Bonding & Insurance Co. v. Dingle-Clark Co., 52 NE 2d 340 (Ohio);

City of Lewiston v. Isaman, 19 Idaho 653, 115 P. 494, 499;

Fidelity and Casualty Co. of N. Y. v. Federal Express, 136 Fed. 2d 35 (6th Cir. 1943);

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nor given an opportunity to defend that action by any person. However, the Railroad and the Lumber Company are both bound and concluded as to all facts established against the Railroad in the earlier action, and if the judgment in the earlier action rested on a fact fatal to recovery in an action over against the indemnitor, the later action against the indemnitor may not be successfully maintained.

American Surety Co. v. Singer Sewing Machine Co., 18 Fed. Sup. 750, 753.

Since the Lumber Company was required to pay the Railroad because of its contract of indemnity, the Lumber Company would be in the position of a subrogee. A subrogee or insurer stands in the same shoes as does the party he insures or indemnifies.

Massachusetts Bonding & Insurance Co. v. Dingle-Clark Co., 52 N.E. 2d 340, 344 (Ohio).

Atlanta Consolidated Street Ry. Co. v. Southern Bell Tel. & Tel. Co., 107 F. 874 (Cir.Ct. ND. Ga.);

Booth-Kelly Lumber Co. v. The Southern Pacific Co., 183 F. 2d 902 (9th Cir.).

Section 95 of the Restatement of Law of Restitution, Chapter 3, Page 415, provides as follows:

> "Person Responsible for a Dangerous Condition:
> "Where a person has become liable with another for harm caused to a third person because his negligent failure to make safe a dangerous condition of lands or chattels, which was created by the misconduct of the other, or which, as between the two it was the other's duty to make safe, he is entitled to restitution from the other for expenditures properly made in the discharge of such liability *unless after discovery of the danger, he acquiesced in the continuation of the condition.*" (Italics ours.)

The editors of the Restatement elaborate on what they mean by acquiesce in the "continuation of the condition" in the comment following the principal rule.

> "In all of these situations the payor is not barred by the fact that he was negligent in failing to discover or to remedy the defect as a result of which the harm was occasioned; in most of the cases it is because of this failure that he is liable. On the other hand, if the condition was such as to create a grave risk or serious harm to third persons, or their property, and the payor was, or from his knowledge of the facts should have

been aware that such a risk existed, his failure to make the condition safe is reckless, and he is not entitled to restitution."

A number of courts[10a] have construed this provision in the Restatement. Other courts, while not expressly referring to the Restatement of the Law of Restitution, Section 95, supra, have arrived at the same result. In each case acquiescence in a dangerous condition has resulted in a Court holding that the person who knew of the dangerous condition was a joint tort feasor and could not recover from the person responsible for the existence of that same condition.

In *Stabile v. Vitullo,* 112 N.Y. Sup. 2d 693, a stairway was damaged through the negligence of a third party. The building owner failed to repair it, though he knew of the damage for a period of four and one-half months prior to the accident. The Court held that he "knowingly permitted and acquiesced in the continuation of the condition until plaintiff met her injury."

A seaman's employer was held negligent where it or its employees knew that a ship's ladder was dangerous, even though the dangerous condition resulted from the act of a third party. Accordingly, in *Spaulding v. Parry Navigation Co.,* 90 Fed.Sup. 564 (U.S. D.C. S.D. N.Y.) contribution was denied, even though

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[10a]See discussion of *Booth-Kelly Lumber Co. v. The Southern Pacific Co.,* 183 F. 2d 902, which appears in the Appendix. In that case, this Court examined many of the principles of law applicable here.

the Todds Shipyards Corp., a third party defendant, placed the ladder against the ship and controlled the ladder which proved to be defective and on which the seaman was injured. The New York Federal Court specifically quoted the provision from the Restatement of Restitution 95, supra, and held that the facts in that case which were submitted to the jury, and the jury's answer to specific questions submitted to it, showed that the employer of the injured seaman acquiesced in the dangerous condition of the ladder.

A New York Appellate Court held that an owner who fails to repair a fence, knocked down by the negligence of a third party, was a joint tort feasor where that owner knew of the dangerous condition. The Court quoted the principle taken from the Restatement of the Law of Restitution, Section 95, and said as follows:

> "But, after the breaking down of the wire fence there was abandonment by both of the hazardous wire on the loose, and, moreover, to the factual or presumed knowledge of Crystal, the dangerous status quo was permitted to remain for more than two working days, until Mrs. Falk's feet became entangled with the wire on the sidewalk. With notice of the condition the owner here not only did nothing, but knowingly permitted it to remain. The duty of the owner not to create danger, and the duty not knowingly to permit it to continue, normally and morally imposed equal liability." See p. 70.
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> *Falk v. Crystall Hall, Inc.,* 105 N.Y. Supp. 2066.

A similar result was reached in *Standard Accident Insurance Co. v. Sanco Piece Dye Works,* 64 N.Y. Sup. 2d 585. In this case the owner of the premises knew that Sanco was negligently letting steam out through a window across a driveway on which the plaintiff in the action was injured. The owner of the premises was a co-defendant, and he sought indemnity from Sanco. Sanco was in full control of the steam. Because of the steam shooting across the driveway, the plaintiff was forced to drive around it and in doing so collided with another car. The Court held that the parties were *in pari delicto* since the owner, Garnerville, knew of the dangerous condition and acquiesced in it. Again, in *Taylor v. J. A. Jones Construction Co.,* supra (141 SE 492) (NC), the employee successfully sued the Jones Construction Co., which was trying to get full contribution from one Marcum, an independent contractor. Marcum was under contract to put the steel in an office building that was to be ten stories high. Marcum raised certain steel negligently and a large beam fell from above striking the plaintiff workman. Jones Construction Co. was charged with negligence in failing to provide the employee with a reasonably safe place to work. The Supreme Court of North Carolina held that the evidence showed that the employer knew of the danger and acquiesced in it. Thus he was a joint tort feasor and he could not receive contribution under those circumstances.

The Restatement of the Law of Restitution has been recently applied in *Massachusetts Bonding &*

Insurance Co. v. Dingle-Clark Co., 52 N.E. 2d 340 (Ohio). In this case an employee by the name of Henzi worked for a sub-contractor of a steel company. The steel company was the *assured* of the plaintiff bonding and insurance company. Certain construction work was undertaken at the steel company's plant. A moving company while working at the plant removed some barricades from around a hole in the floor of the building. The barricades were not replaced. Dingle-Clark was a subcontractor of the steel company who in turn had subcontracted to the party which moved the barricade. At the trial, the steel company was adjudged negligent for failing to provide good lighting *and* for failing to provide barricades around the hole. The barricades had been removed three days prior to Henzi's injury. The Ohio Supreme Court held that the steel company had acquiesced in the dangerous condition created by the subcontractor who removed the barricade. The acquiescence was charged to the steel company because three whole days had elapsed since the barricades were taken down. The steel company, being a joint tort feasor, was precluded from recovering contribution from its subcontractor, Dingle-Clark Co., who was responsible for the action of the party that removed the barricade. The Ohio Supreme Court also noted that the insurance company stood in the same shoes as the steel company in attempting to get contribution from the defendant. And in our case, too, the Lumber Company would stand in the same shoes as the Railroad Company and it would be bound by the fact that

the Railroad was a joint tort feasor and precluded from contribution.

Bedal would like to *reiterate* that the records of both trials conclusively show that the railroad had knowledge of all the conditions and circumstances surrounding the unloading of logs at Banks, Idaho. The conditions that surrounded Powell's employment were such that the company had a duty to provide him with a safe place to work. The jury in the Powell case did not decide that the splinter which flew off the log was the result of any negligent acts of Bedal's employees. There is not one scintilla of evidence which shows that Bedal or his employees were negligent in preparing the logs or cutting the logs prior to the time they were unloaded. The jury held in the first action that the Railroad was negligent for failing to provide a safe place for its employee, Powell, to work, considering the pre-existing conditions of which it had full knowledge. But the trial Court not only failed to grant Bedal's motion for a nonsuit, but it even failed to submit the question to the jury as to whether or not the Railroad participated in the tort and was a joint tort feasor. This, too, is reversible error.

IN A MOTION FOR A DIRECTED VERDICT, ALL REASONABLE INFERENCES ARE DRAWN IN FAVOR OF THE PARTY AGAINST WHOM THE MOTION IS MADE.

Bedal did not have a chance to get his case to the jury. The Trial Court decided that (a) Bedal was adjudged negligent as a matter of law in the Powell

case, (b) that Bedal's negligence was the primary cause for Powell's injuries, (c) that the Union Pacific Railroad did not acquiesce in any dangerous condition, (d) that this Railroad's negligence was passive, not active, (e) that Bedal's logging contract was an indemnity agreement and (f) that Bedal was asked to defend the Powell case by the Railroad.

Appellants contend that there is no evidence to support any of these findings, much less evidence that shows as a matter of law the propositions the trial court must have found to be true when it directed a verdict against Bedal.

The District Judge ignored the multitude of Idaho cases which construe a motion for a directed verdict against the party making the motion. Appellants need not spend time here discussing the well known principles of law surrounding the proper use of the directed verdict, although the following cases are called to the Court's attention:

Hobbs v. Union Pac. R. Co., 62 I. 58, 108 P. 2d 841;

Hayward v. Yost, 72 I. 415, 242 P. 2d 971;

Carson v. Talbot, 64 I. 198, 129 P. 2d 901;

Stearns v. Graves, 62 I. 312, 111 P. 2d 882;

Allan v. Oregon Short Line R. Co., 60 I. 267, 90 P. 2d 707;

McCornick and Co., Bankers v. Tolmie Bros., 42 I. 1, 243 P. 355;

Smith v. Manley, 39 I. 779, 230 P. 769;

Hendrix v. City of Twin Falls, 54 I. 130, 29 P. 2d 352;

Servel v. Corbett, 49 I. 536, 290 P. 200.

THE CONTRACT BETWEEN BEDAL AND LUMBER COMPANY DOES NOT INDEMNIFY THE LUMBER COMPANY AGAINST DAMAGES IT SUSTAINED BY REASON OF THE NEGLIGENCE OF THE RAILROAD COMPANY.

The logging contract between Bedal and the Lumber Company is attached to cross-complainant's complaint as Exhibit B. (R. 27.) The Lumber Company contends that this is a contract of indemnity.[11]

It can be seen from this long contract, together with the amendments to the contract, that the Lumber Company and Bedal were primarily concerned with log hauling from the forest to the Railroad cars at Banks, Idaho. Bedal's job was to cut, skid, haul and deliver to the Railroad at Banks, Idaho, and load on Railroad cars all the timber the Lumber Company had purchased from the United States Forest Service in certain areas in Southwestern Idaho. It is from this long contract that the Lumber Company has singled out two phrases appearing in different places in the contract from which it contends Bedal agreed to indemnify the Lumber Company for the negligence of the Railroad. These two paragraphs are set out here as follows, in full:

> "It is further stipulated and agreed that under no circumstances or conditions in the party of the first part to become liable for any claims whatsoever which may be incurred by the parties of the second part or any of their agents, servants or employees in carrying out this contract, and under no circumstances shall this agreement be

[11]The Lumber Company never argued this position too seriously and, in fact, counsel for the Lumber Company did not even mention it in his motion for a directed verdict. (R. 245, 247.)

considered as a partnership agreement, nor shall the parties of the second part be considered by this contract, or any interpretation thereof, to be the agents of the first party, and it is understood and agreed that this is what is commonly termed and called an independent contractor's agreement."

"Second parties further agree that all trucks and drivers are to be covered by insurance to take care of public liability and property damage, said insurance to specifically name and protect said first party, in case of possible accident involving persons or property not connected with or owned by the parties to this contract. Second parties further agree that the use of their trucks on the public roads shall be in strict compliance with the state regulations governing such use, and will at their own expense provide each truck with all equipment for safe operation and comply with all the rules and regulations of the United States and the State of Idaho, and any and all rules and regulations promulgated by said United States or the State of Idaho or any bureau or agency thereof."

To make these two paragraphs mean what the Lumber Company would like the Court to make them mean would be to distort the plain meaning of words. The first paragraph that we quoted is an attempt by the Lumber Company to make clear to Bedal that he is an independent contractor and in addition to make clear to everyone else that Bedal is an independent contractor and that the Lumber Company is not to become liable for any of the claims against Bedal

because of the action of any of Bedal's servants. Traditionally, an independent contractor, and he alone, would be responsible for the action of his servants.[12] The Lumber Company wished to make this clear. It wished to show the world that neither Bedal, or his employees, were its agents or servants. Actually Bedal and his employees have not incurred any "claims whatsoever" in the carrying out of the contract. It is *now* that the Lumber Company is asking Bedal to incur a claim. The claim that it wants it to pay is the one the Railroad held the Lumber Company responsible for. It does not say in that paragraph that Bedal is to be liable because the Lumber Company contracted in its lease with the Railroad to indemnify the Railroad against its own negligence. It does not say that Bedal is to become liable for a claim that a jury stated the Union Pacific Railroad Company was responsible for. The Lumber Company did not become liable to the Railroads because of any claim incurred by Bedal. That much is true.

In the second part of this long contract, Bedal agreed to carry liability insurance on the trucks and to name the Lumber Company as a party insured. This was to protect the Lumber Company in the event some party sued Bedal or the Lumber Company because of the negligent operation of a truck. First of all, an agreement to carry insurance is not an agreement to indemnify. Secondly, there has been no litigation in which Bedal has been adjudged negligent

[12]27 *Am. Jur.* 504, Sec. 27.

in the operation of a truck. It is only when one of his drivers has been adjudged negligent in driving a truck, that the Lumber Company could claim damages. But it was not from any of these things that the Lumber Company was held responsible to the Railroad. Again, as stated in the preceding paragraph, it was because the Lumber Company agreed by contract, of its own volition, to indemnify the Railroad against its own negligence. We will discuss this whole question of the Court's ruling in the Railroads' case against the Lumber Company in a subsequent section. But suffice it to say at this point that it was the Court's ruling that the reason the Railroad Company recovered against the Lumber Company was because of the fortuitous provision in its lease.

When a person seeks indemnity, he does not seek contribution. He seeks full complete reimbursement. He seeks reimbursement, not only for specific damages, but for all expenses and attorneys' fees that may have been incurred as a result of the failure of a third party to reply in indemnity, either express or implied. *Crawford v. Pope and Talbot, Inc.,* 206 Fed. 2d 784. When one indemnifies there is a total shifting of economic loss to the party chiefly or primarily responsible for that loss, either because of the latter's contract or because of an operation of law. *Smart, et al. v. Marard, et al.,* 124 N.Y. Sup. 2d 634. It is because of the nature of indemnity that a contract which is not specifically an indemnity contract is always strictly construed in favor of the indemnitor.

Bedal does not feel that this particular contract requires strict construction in order to sustain a finding in favor of Bedal. Certainly, there is nothing in the provisions just quoted that makes Bedal liable for the Lumber Company's contractual obligation. This has nothing to do whatsoever with the carrying of public liability insurance. The carrying or not carrying of such insurance is not an agreement to indemnify. This is particularly true when there has never been a set of circumstances arise from which it could be ascertained that Bedal or one of his employees was negligent in the operation of the trucks. Certainly, not even the Lumber Company contends it—the Lumber Company—was negligent in any way in either of the two cases. Nevertheless, Bedal will quote several principles of law and the authorities for those principles and point out to the Court that an agreement to carry liability insurance has not been construed as being an agreement to indemnify.

A CONTRACT WILL NOT BE CONSTRUED AS ONE FOR INDEMNITY, PARTICULARLY AGAINST ANOTHER'S OWN NEGLIGENCE, UNLESS SUCH A CONSTRUCTION IS REQUIRED BY CLEAR, EXPLICIT AND UNEQUIVOCAL LANGUAGE IN THE CONTRACT.

This general principle of law has been applied almost universally by the Courts. This principle is not applied when an insurance company writes an indemnity policy. Of course, in those cases it is the business of the insurance company to write such a policy. But it is *not* the business of Bedal, a logging

contractor, to act as an insurance company or indemnitor. The Fifth Circuit Court of Appeals in *Employers Casualty Co. v. Howard P. Foley Co., Inc.*, 158 Fed. 2d 363, 364, observed:

> "* * * It is certainly the general rule that, where the indemnity is not contracted for from an insurance company whose business it is to furnish indemnity for a premium, and where indemnity is the principal purpose of the contract; but from one not in the indemnity business and as an incident of the contract whose main purpose is something else, such as a sub-construction contract, the indemnity provision is construed strictly in favor of the indemnitor."

In this case the Court was construing the following provision of the lease:

> "(2) Lessee hereby releases Lessor from any and all damages to both person and property and will hold the Lessor harmless from all such damages during the term of this lease."

The Court examined the latter part of the above lease provision and held that the covenant was not specific enough to be a covenant of indemnity. That being the case, the provision was construed in favor of the indemnitor. There are many cases in which this principle of law has been repeated and in which the Courts have held that contracts should not be construed as indemnity agreements unless the terms of the contract clearly require such an interpretation.

See *Southern Railway Co. v. Coca Cola Bottling Co.*, 145 Fed. 2d 304, 307 (4th Cir.); *Sinclair Prairie*

Oil Co. v. Thornley, 127 Fed. 2d 128 (10th Cir.); *Kay v. Pennsylvania Railway Co.,* 103 NE 2d 751 (Ohio); *Employer Liability Assurance Corp. v. Post & McCord, Inc.,* 36 NE 2d 135, 139; *Halliburton Oilwell Cementing Co., et al. v. Paulk, et al.,* 180 Fed. 2d 79, 83, 84.

In *Westinghouse Electric Elevator Co. v. LaSalle Monroe Building Corporation,* 70 NE 2d 604 (Ill.), a contractor agreed to provide and pay compensation for injuries sustained by any of its employees arising out of or in the course of the employment within the building where the contractor was working. Further, the contractor "* * * agreed to carry insurance in a company satisfactory to the owner fully protecting himself, the architects and engineers, the consulting engineer and the owner against claims which may be made under said laws, and agreed to deposit said policy (or a true copy thereof) or a certificate from the insurance company issuing said policy, showing insurance in force with the architects and engineers. * * *". In addition, the contractor, which was Westinghouse, agreed to indemnify the owner on account of any of the negligence of the contractor's employees. In this case an employee of Westinghouse was killed when an elevator slipped and fell on top of him. Westinghouse was suing the LaSalle Monroe Building Corporation to recover the money it paid the employee because of his death. The building corporation put up these contract provisions with Westinghouse as a defense. The Illinois Court held it was no defense and that the agreement to carry such insurance was not an

indemnity provision, stating that such a holding "would impose on the contractor the duty to indemnify against injuries entirely without his control, and such should not be adopted in the absence of clear language in the contract, including injuries arising from the negligence of appellant's own servants".

In *Sinclair Prairie Oil Co. v. Thornley,* supra, the Court of Appeals for the 10th Circuit held that an agreement to carry liability insurance in a contract between an oil company and an independent contractor who was to deepen a well for the plaintiff was not such a provision as could be construed as a contract for indemnity. In this latter case, not only did the independent contractor, a man named Engle, agree to carry workmen's compensation, employers' and public liability insurance, but he agreed to assume responsibility for "all such claims and to hold Sinclair free, clear and harmless therefrom". (See page 130.)

An employee of Engle's was killed when a well was being cleared out by a process connected with the lowering of a five inch pipe into a hole. There was sufficient evidence in that case to predicate negligence against Sinclair itself, since the superintendent knew that certain gas might come in contact with a burning stove. The Court also stated on page 133 as follows :

> "Sinclair interprets the provision of Engle's contract in which he agreed to carry Workmen's Compensation and to assume the responsibility for all such claims and to hold and save Sinclair free, clear and harmless therefrom, to mean that

Engle would become liable over to Sinclair for any liability attaching to it, even if such liability arose from its own negligence under any of the operations of either Engle or Haliburton. An indemnity contract will not be construed as indemnifying one against his own negligence, unless such a construction is required by clear and explicit language of the contract. Do-nut Machine Corp. v. Bibbey, 1st Cir., 65 Fed. 2d 643; North American Railway Construction Co. v. Cincinnati Traction Co., 7th Cir. 172 Fed. 214; Thompson-Starrett Co. Inc. v. Otis Elev. Co., 271 N.Y. 36, 2 N.E. 2d 35. Here the parties contracted for the deepening of a well. The contractor was required to carry various kinds of protective insurance. He then agreed to assume liability for all such claims, that is, claims for Workmen's Compensation, Employers' and Public Liability, and to hold the company free, clear and harmless from such claims. This is a provision generally found in such contracts, and the natural import thereof is that the contractor will so carry on his operations that no liability therefrom will attach to the other party. We can read nothing into the contract that would require Engle to indemnify Sinclair against liability from his own negligence, unless negligence on the part of Engle concurred with the negligence of Sinclair.

"Whether Engle was guilty of negligence which concurred with the negligence of Sinclair and proximately caused the injury raised a question of fact to be determined by the jury. While the question was not submitted to the jury in that form, it was indirectly submitted by submitting

> the question of whether Mr. Engle was liable to Thornley. The jury absolved Engle from liability to Thornley. Absolving him from negligence which would make him liable to Thornley, likewise absolved him from negligence concurring with that of Sinclair."

These two cases that have just been mentioned are cases in which the alleged indemnitee seeks to hold its independent contractor on grounds of actual negligence. It will be noted that in the case at hand the Lumber Company is trying to take the words in its contract with Bedal and so construe them as to protect the Lumber Company FROM ANY LOSS IT MIGHT SUSTAIN BY REASON OF ITS SEPARATE INDEPENDENT CONTRACT ARRANGEMENT WITH THE RAILROAD, whereby it indemnified the Railroad against its own negligence. Is there any mention in the logging contract of such an undertaking? Is it natural that Bedal would make such an agreement? Can the provisions just quoted from Bedal's contract indicate to anyone that Bedal agreed to indemnify the Lumber Company at all? The only liability that could attach to Bedal by virtue of his agreement to carry insurance would be that in the event the Lumber Company was adjudged negligent by a Court or jury because of the negligence of one of the truck drivers of Bedal, then the Lumber Company would be entitled to have insurance protection. There can be no way in which a reasonable person could construe these provisions as imposing on Bedal the duty and obligation of a general indemnitor.

A contract should be interpreted so to arrive at the intent of the parties and give a contract its ordinary meaning. An agreement to carry liability insurance is not an agreement to indemnify, particularly where there has been no action taken which would activate such insurance. The distinction between the two can be noted in *Burks v. Aldridge,* 121 P. 2d 276, 280 (Kans.). Actually the principal grounds upon which the Lumber Company has always relied has been that there is an implied in law obligation on the part of Bedal to indemnify the Lumber Company.

STATEMENT OF FACTS II.

This is an appeal from the judgment of the Federal District Court for the District of Idaho, in which the Court awarded damages in favor of the Oregon Short Line Railroad Company and the Union Pacific Railroad Company, and against The Hallack and Howard Lumber Company, a corporation. (R. 103, 104.)

Bedal will present a second Statement of Facts and Argument without repeating what was included in the first Statement of Facts, the First Argument, Statement of the Case, or Specifications of Error, unless absolutely necessary. Appellant will not repeat here the Statement of the case or the Specifications of Error since they have been adequately covered heretofore.

Bedal answered the complaint of the Railroads against the Lumber Company. (R. 72.) Bedal admitted the execution and delivery of the lease, Plaintiff's Exhibit A, and the fact that the lease was in full force and effect on September 15, 1949. The special and affirmative defenses of Bedal to the Railroad's complaint were stricken by the order of the Court dated September 15, 1953. (R. 89.) Only the affirmative defenses were stricken, not the answer.

The complaint of *The Hallack and Howard Lumber Company v. W. O. Bedal* was based upon the possibility of the recovery of a judgment by the Union Pacific Railroad Company and the Oregon Short Line Railroad Company against the Lumber Company. (R. 19, 22.)

On March 3, 1954, the Oregon Short Line Railroad Company leased certain of its ground located on its right-of-way, to The Hallack and Howard Lumber Company. (R. 8, 13.) A map showing the leased area in yellow is attached to the lease agreement (Exh. A), and can be seen in the record at page 13. The consideration for the lease was the payment to the Oregon Short Line Railroad Company of $55.00 per year. (R. 10.) On November 16, 1948, the original lease was extended until February 28, 1954, by an extension rider. (R. 8.) It was agreed by the parties to the lease that the premises leased should be used for no other purpose than for log loading. (R. 10.)

The Railroad recovered a judgment against the Lumber Company by virtue of lease provision which

the trial Court construed as indemnifying the Railroad against its own negligence. This lease provision is Section 5, which provides as follows:

> "Section 5. It is especially covenanted and agreed that the use of the leased premises or any part thereof for any unlawful or immoral purposes whatsoever is expressly prohibited; that the Lessee shall hold harmless the Lessor and the leased premises from any and all liens, fines, damages, penalties, forfeiture or judgments in any manner accruing by reason of the use or occupation of said premises by the Lessee; and that the Lessee shall at all times protect the Lessor and the leased premises from all injury, damage or loss by reason of the occupation of the leased premises by the Lessee, or from any cause whatsoever growing out of said Lessee's use thereof."

Another provision in the lease which actually provides for indemnity is Section 13. (R. 11.)[13]

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[13]"Section 13. It is understood by the parties hereto that the leased premises are in dangerous proximity to the tracks of the Lessor, and that by reason thereof, there will be constant danger of injury and damage by fire, and the Lessee accepts this lease subject to such danger.

"It is therefore agreed, as one of the material considerations for this lease and without which the same would not be granted by the Lessor, that the Lessee assumed all risk of loss, damage, or destruction of or to buildings or contents on the leased premises, and of or to other property brought thereon by the Lessee or by any other person with the knowledge or consent of the Lessee and of or to property in proximity to the leased premises when connected with or incidental to the occupation thereof, and any incidental loss or injury to the business of the Lessee, where such loss, damage, destruction or injury is occasioned by fire caused by, or resulting from the operation of the railroad of the Lessor, whether such fire be the result of defective engines, or of negli-

From the evidence adduced at the trial of this case and discussed in the Statement of Facts in the appeal of W. O. Bedal from the judgment against him by The Hallack and Howard Lumber Company, and from the statements contained in the Findings of Fact and Conclusions of Law (R. 92), as amended by order of the Court (R. 113), shows conclusively that The Hallack and Howard Lumber Company was not liable to the Railroad because of its negligence. That the Court found The Hallack and Howard Lumber Company was liable to the Railroad because of the contract alone is clearly seen in its statement to the jury on pages 254 and 255 of the Record.

The Railroad in its action against the Lumber Company admitted into evidence all relevant pleadings together with the transcript of the case of A. M. Powell v. Union Pacific Railroad Company. (Plaintiff's Exh. 2, R. 128, 154, Exh. 7.)

The leased property began about 6 feet from the west line of the railroad tracks at Banks, Idaho. (R. 168.) The bunker in front of the track was about 6 to 8 feet high. (R. 180.) The injured party, Powell, stepped from the top of an empty railroad car on the track, up about 2 feet to the bunker. (R. 182.) The

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gence on the part of the Lessor or of negligence or misconduct on the part of any officer, servant or employee of the Lessor, or otherwise, and the Lessee hereby agrees to indemnify and hold harmless the Lessor from and against all liability, causes of action, claims or demands which any person may hereafter assert, have, claim or claim to have, arising out of or by reason of any such loss, damage, destruction or injury, including any claim, cause of action or demand which any insurer of such buildings or other property may at any time assert, or undertake to assert, against the lessor.'' (R. 11.)

very furtherest that the bumper logs were from the track was stated by Parrish to be about 3 or 4 feet. (R. 227.) It would appear then, that the bunker logs were just off the leased premises, being between the leased premises and the track. Logs were unloaded at this log loading site (which was the sole use of the premises contemplated by the lease agreement) (R. 110), for a long time prior to the time Powell was injured. Logs were unloaded in the usual manner on the date of his injury on September 15, 1949. (The transcript in the original Powell case, Plaintiff's Exh. 7, p. 62; also present Record, pp. 231, 218, 208, 207 and 240.)

ARGUMENT II.

THE TRIAL COURT ERRED IN DECIDING THAT SECTION 5 OF THE LEASE AGREEMENT BETWEEN THE RAILROADS AND THE LUMBER COMPANY INDEMNIFIED THE RAILROAD AGAINST ITS OWN NEGLIGENCE.

The sole question presented on this appeal from the judgment in favor of the Railroads is whether the trial Court erred in construing Section 5 of the lease agreement (R. 10) in such a way as to hold The Hallack and Howard Lumber Company responsible for the sole negligence of the Railroad.

There are no cases in Idaho in which an indemnity agreement such as the one involved here has been construed by Courts of Idaho. It will be necessary in examining this agreement to refer to the general law as applied by other Courts.

Bedal would like to call the Court's attention to the principle stated heretofore in this brief, which is as follows:

> "A contract should not be construed as one for indemnity against another's own negligence, unless such a construction is required by clear, explicit and unequivocal language in the contract."

Bedal has cited in the prior ARGUMENT cases which sustain this principle of law. That this principle is sound cannot be questioned, especially when such a construction involves a contract between parties neither of which is an insurer, nor in the business of writing indemnity policies. In the case at hand, the Union Pacific Railroad Company, and the Oregon Short Line Railroad Company, made a business arrangement with The Hallack and Howard Lumber Company. The consideration was $55.00 a year for the rental or lease of a small piece of land. The primary purpose for the lease was to provide The Hallack and Howard Lumber Company with a log loading site. In fact the lease provided this was all the premises could be used for. (R. 10.) The Railroad benefited not only by reason of an annual rental—for a very small piece of ground—but in addition, of course, got more business for its Railroad.

As noted in the Statement of Facts the method and manner of unloading logs at this particular location was the same on the day of the accident as it had been for months, and indeed, years, prior to that time. The Railroad Company leased the premises as they were.

The slab that flew off the log and injured Powell was a strange and unheard of experience in the memories of all of those witnesses testifying at either the Powell trial or the present one. The lease agreement was the kind of contract that would contemplate logs being unloaded at that site. Powell, a car inspector for the Union Pacific Railroad Company, customarily worked along the track inspecting cars that were being loaded with logs. On the day of the accident, as the Statement of Facts in the first brief portion show, Powell walked 60 feet north from the approximate location the logs were being dumped. A slab hit him that flew off the logs as the logs were being rolled down the hill. He did not see the slab until it was 3 or 4 feet from him. Powell was standing at that time on top of a log bunker that was located approximately 3 or 4 feet from the railroad track. The edge of the leased premises was 6 feet from the railroad track. Thus Powell was not even standing upon the leased premises.

An independent contractor of the Lumber Company, Bedal was in charge of unloading the logs. The Hallack and Howard Lumber Company had no employee present at the scene except a man by the name of Sage who scaled the logs prior to their being loaded on the railroad car. The road way and slope that existed at the time of the Powell accident, also existed at the time the lease was entered into, as can be seen from the map. (Plaintiff's Exh. A, R. 13.) On the date of the accident the Railroad Company alone had con-

trol over Powell, its employee. There is no evidence that any other person had such control, nor is there any evidence that any other person knew that Powell was where he was at the time the logs were unloaded except those men standing by him. Under these facts —and we feel that these facts were indeed slim ones on which to base a judgment in the first place—Powell recovered $15,000.00, and the motion of the railroad for a judgment notwithstanding the verdict was denied by the trial Court.

The question is then, could the trial Court read section 5 of the lease agreement and decide that the Lumber Company was liable to the Railroad because of the Railroad's negligence. Bedal thinks not. Appellant feels that as a matter of law the lease agreement cannot be construed to indemnify the Railroad against its own negligence, particularly where there is no evidence or finding that The Hallack and Howard Lumber Company too was negligent. Let us examine some of the cases that have construed a general hold harmless agreement, such as the one we find in Section 5. In *Ocean Accident and Guarantee Co. v. Jensen,* 203 Fed. 2d 682 (8th Cir. 1953) an owner of a tavern leased his premises to the defendant, and a part of the lease provided as follows:

> "8. The Lessee shall keep said premises and operate his business therein, in a manner which shall be in compliance with all laws, rules and regulations, orders and ordinances of the City, County, State and Federal Government and any

> department of either and will not suffer or permit the premises to be used for any unlawful purpose, and he will protect the Lessor and save him and the said premises from any and all fines and penalties, and any and all damages and injuries that may result from or be due to any infractions of, or non-compliance with, the said laws, rules, regulations, orders and ordinances * * *".

The plaintiff insurance company was the insurer of the tavern owner and settled the case with two people who fell down the stairs of the tavern. They brought the suit against Jansen, the lessee. The stairs were one half inch narrower than those required by the city ordinance and there was no handrail present either. The handrail, too, was required by the city ordinance. The Federal Court stated the general rule as follows:

> "The rule is well established that indemnity agreements made between parties and under such circumstances as exist here, would not be construed to obligate the indemnitor to indemnify the indemnitee against claims or losses arising from the indemnitee's own negligence unless it clearly and unequivocably appears that such was the intention."

The Court put particular emphasis on the fact that the stairs were in the same condition when they were leased to Jansen as they were when the two people that fell down the stairs were injured. The Court felt that the lease did not clearly and unequivocably encompass losses occasioned by the negligence of the indemnitee.

In the case in front of *this* Court the Railroad leased the premises in the same general condition as it was on the date of Powell's injury. There is nowhere in Section 5 an unequivocable statement either (a) that the Lumber Company will be liable for the negligence of the Railroad, when it itself is not negligent, or, (b) that the Lumber Company specifically agreed to hold the Railroad harmless from negligence to its own employee. The word "employee" does not appear in Section 5, nor does the word "negligence" appear. Contrast with this section, section 13 of the lease. (R. 11.) In this latter section the Railroad wanted to make it clear that it wished to indemnify itself even against its own negligence. There the word "negligence" appears and The Hallack and Howard Company agreed, in case of fire or loss occasioned by the Railroad's negligence, to hold the Railroad harmless. The meaning of Section 13 is clear and explicit. In section 13, for example, it is clearly pointed out that as one of the material considerations for the lease, the lessee is to assume all loss to buildings on the leased premises, or to any other property resulting from the operation of the Railroad, whether such fire be the result of defective engines, or of "negligence on the part of the Lessor or of negligence or misconduct on the part of any officer, servant or employee of the lessor, or otherwise, and the lessee hereby agrees to indemnify and hold harmless the lessor from and against all liability * * * by reason of any such loss, damage, destruction or injury * * *". The Railroad could have put such language in Section 5. It didn't.

Section 5 states that the Lumber Company agrees to use the leased premises for lawful purposes. There was no breach of this agreement. Then the lessee agreed to hold the lessor harmless from any damages, or judgments accruing by reason of the use or occupation of said premises. Does that language clearly and unequivocably state that the Hallack and Howard Lumber Company is to be liable for the Railroad's negligence? Does that language differ from the language used in a score of other cases where the indemnitor is not negligent and where the Courts hold the indemnitee has no right or cause of action against the indemnitor? Did the trial Court read that section and strictly construe the paragraph as the law requires? In *Kay v. Pennsylvania Railway Co.,* 103 N.E. 2d 751 (Ohio 1952), a railroad company entered into a switch track agreement with the Blanket Company. One of the railroad's employees was injured when his head struck an overhead draw bridge while riding on top of a freight car. The draw bridge was constructed by the Blanket Co., and the railroad sued the Blanket Co. as a third party defendant, and stated that the latter had agreed to indemnify the railroad against its own negligence. The Court held that since the indemnity agreement, though mentioning other kinds of structures, did not specifically mention a draw bridge, it would not be construed as an indemnity agreement. In so holding the Court said:

> "Where, in a contract of indemnity, general words are used after specific terms, the general words will be limited in their meaning to things of like

kind and nature, as those specified. Thus, a clause in the contract to save harmless from loss, damage or injury, by 'fire or otherwise' including the negligent operation of lessor's locomotive, and the clause 'holding the lessor harmless from all injury,' etc., that may result from the operation of the 'unloading machine and appurtenances or other buildings, structures or fixtures' was held not to include damages resulting from a drawbridge built by the defendant Blanket company, inasmuch as the unloading machine is nothing like a drawbridge."

Also see:

Martin et al. v. American Optical Co., 184 Fed. 2, 528 (5th Cir. 1950);

Foster v. Pennsylvania Railroad Co., 104 Fed. Sup. 491 (E.D. Pa. 1952);

Westinghouse Electric Elevator Co. v. LaSalle Monroe Building Co., a corporation, 70 N.E. 2d 604 (Ill. 1946);

Glens Falls Indemnity Co. of Glens Falls, N.Y. v. Reimers, 155 P. 2d 923, 925;

Sinclair Prairie Oil Co. v. Thornley, 127 Fed. 2d 128 (10th Cir. 1942);

Southern Railway Co. v. Coca Cola Bottling Co., 145 Fed. 2d 304, 307 (4th Cir. 1944).

An important difference exists between the circumstances of this case together with the lease provision found in the agreement between the Union Pacific Railroad and the Lumber Company, and the circumstances existing in *Booth-Kelly Lumber Company v.*

Southern Pacific Railroad Company, 183 Fed. 2d 902, 20 A.L.R. 2d 695.

The lease provision in the *Booth-Kelly* case[14] from which the Court of Appeals for the Ninth Circuit held to be an indemnity agreement, provided as follows:

> "Industry also agrees to indemnify and hold harmless railroad for loss, damage, injury or death, from any act or omission of Industry, its employees or agents, to the person or property of the parties hereto, and their employees, and to the person or property of any other person or corporation while on or about said track; * * *".

Section 5 of our lease agreement provides as follows:

> "Section 5. It is especially covenanted and agreed that the use of the leased premises or any part thereof for any unlawful or immoral purposes whatsoever is expressly prohibited; that the Lessee shall hold harmless the Lessor and the leased premises from any and all liens, fines, damages, penalties, forfeitures or judgments in any manner accruing by reason of the use or occupation of said premises by the Lessee; and that the Lessee shall at all times protect the Lessor and the leased premises from all injury, damage or loss by reason of the occupation of the leased premises by the Lessee, or from any cause whatsoever growing out of said Lessee's use thereof."

In the *Booth-Kelly* case, the defendant also had violated a specific provision of the spur-track agree-

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[14]See Appendix for a further discussion of *Booth-Kelly Lumber Co. v. Southern Pacific Railroad Co.,* supra.

ment by putting a cart less than 6 feet away from the railroad track.

In the case in front of this Court we are not concerned with an agreement in which the railroad has gone onto the property of the Hallack and Howard Lumber Company and consented to put in a spur track. In those cases it is more natural that the Railroad Company would expect that while operating on the lessor's premises it would be held free and clear of any responsibility whatsoever. Here the Railroad leased its *own* property for a valuable consideration. Here the actual accident occurred on the Railroad property, and apparently not even on the leased property. Furthermore, the Booth-Kelly Lumber Company was negligent and was so adjudged by the trial Court. It expressly violated a provision in the contract regarding the placing of carts by putting one 42 inches from a track, thereby causing an employee of the Railroad to be crushed between the cart and a moving caboose car. The trial Court further found that the Booth-Kelly Lumber Company's negligence was the primary cause for the injury to the Railroad's employee. Here, the Lumber Company was not adjudged negligent, and had nothing whatsoever to do with the injury to Powell. The Railroads then, are seeking to indemnify themselves for their own negligence. On page 254 of the record, the trial Court said itself that it was an "injustice" to enter a judgment against The Hallack and Howard Lumber Company in the sum of $18,334.15.

Another distinction is that the hold harmless agreement in the *Booth-Kelly* case specifically provided that the Industry would indemnify the railroad for any damage or loss occurring to the railroad's "employees". No such language appears in Section 5 of the lease agreement. The language there is general. There is no unequivocable statement that Hallack and Howard is to be liable for the Railroad's own negligence in harming its own employee.

In the *Booth-Kelly* case the Court specifically points out that the rule of an Oregon case, *Southern Pacific Company v. Layman,* 173 Ore. 275, 145 P. 2d 295, had no application because the Southern Pacific was suing the Booth-Kelly Lumber Company and seeking indemnity from it, not "for its own negligence, but rather for that of Booth-Kelly". The Court implies that under different circumstances, such as existed in the *Layman* case, and as does exist here, even that contract provision would be construed differently. This might be the case even though the Booth-Kelly Lumber Company put a cart less than 6 feet from the railroad track.

Further in the *Booth-Kelly* case there is no statement that the Southern Pacific Railroad knew the car was there or acquiesced in the dangerous condition. In this case all of the evidence in the record shows the Railroad knew at all times of the method and manner of the unloading of logs on the leased premises.

It is these material distinctions between the two cases which require a different result. The only similarity between the facts of the two cases is that a

railroad and a lumber company are parties. If the broad language in Section 5 is to be construed as requiring the Lumber Company to respond for another's negligence, then any language of a general nature could bring about the same results. Bedal believes that this case, unlike the *Booth-Kelly* case, comes squarely within the principles laid down in *Southern Pacific Railroad Company v. Layman,* supra.

In the *Layman* case, Southern Pacific Railroad Company entered into an agreement with Layman whereby the latter was allowed to construct and maintain, and use a private road crossing upon the Railroad's right of way in Oregon. Layman was given a right to use the right of way. One part of the agreement provided that "Licensee shall and hereby expressly agrees to indemnify and hold harmless the Licensor and its lessor, from and against any and all loss, damage, injury, cost and expense of every kind and nature, from any cause whatsoever, resulting directly, or indirectly, from the maintenance, presence or use of said crossing."

The Court can observe how similar that language is to the language in section 5 of the lease agreement with The Hallack and Howard Lumber Co. (R. 10.)

On August 15, 1939, a machine was struck and demolished by the Southern Pacific train. The owner of the machine successfully sued the Southern Pacific Railroad, and recovered because of the latter's negligence. Layman was not negligent nor was he adjudged in any stage of the proceedings to be so. The Oregon Supreme Court pointed out that the agreement should

be strictly construed, particularly where the licensee was not negligent. The Oregon Court held that the provisions did not indemnify the Railroad against its own negligence. In doing so, the Court followed the principle set forth in *Perry v. Payne,* 217 P. 252, 262, 557, 11 L.R.A. N.S. 1173, 10 Ann. Cas. 589, in which the Court said:

> "We think it clear on reading an authority that a contract of indemnity against personal injuries, should not be construed to indemnify against the negligence of the indemnitee, unless it is so expressed in unequivocable terms. The liability on such indemnity is so hazardous, the character of the indemnity so unusual, and extraordinary, that there can be no presumption that the indemnitor intended to assume the responsibility, unless the contract puts it beyond doubt by express stipulation. No inference from words of general import can establish it."

The editors of American Jurisprudence indicate that some Courts hold such provisions indemnifying a party against his own negligence are void as being against public policy.

27 *Am. Jur.* 460, Sec. 9.

Also see

17 *C.J.S.* Contracts, page 644, Sec. 262.

Although it is doubtful that this is the prevailing view, it does show that such agreements are not favored.

In considering not only section 5 itself, but also the circumstances in which it was applied, we feel that the trial Court erred as a matter of law in enter-

ing judgment in favor of the Railroad and against the Lumber Company.

Appellants also appealed from the Findings of Fact and Conclusions of Law entered in support of the judgment in favor of the Railroads. The specific portions complained of are set out in the Specifications of Error. Appellant has discussed these Findings in the first argument wherein it was shown that the trial Court erred in not amending the Findings of Fact and Conclusions of Law according to Bedal's Motion. (R. 113.) The question of whether Bedal was negligent or not was not tendered by the Railroads in their complaint (R. 3); it was not the basis for the judgment of the Court (R. 248, 255, 234); and there was no such evidence presented.

CONCLUSION.

In Conclusion, Appellants contend that not only was the judgment against the Lumber Company not supported by the law under the circumstances and facts presented, but, of course, the Lumber Company's judgment against Bedal was error for the many reasons cited in Bedal's first argument.

Dated, Boise, Idaho,
April 9, 1954.

ELAM & BURKE,
FRED M. TAYLOR,
Attorneys for Appellant.

(Appendix Follows.)

Appendix.

Appendix

THE CASE OF BOOTH-KELLY LUMBER CO. v. THE SOUTHERN PACIFIC COMPANY SUPPORTS THE POSITION OF BEDAL AND NOT THE POSITION OF THE LUMBER COMPANY.

The Court of Appeals for the 9th Circuit on June 28, 1950, wrote a decision which discusses many of the rules of law applicable to cases of the kind now in front of this Court. *Booth-Kelly Lumber Co. v. Southern Pacific Co.,* 183 Fed. 2d, 902, 20 ALR 2d, 695 (9th Circuit).

In this case the Southern Pacific Company sought indemnity from the Booth-Kelly Lumber Company, an Oregon corporation. Earlier Southern Pacific settled a judgment against it by one of its employees, a man named Powers, who sued the Railroad Company on account of certain injuries he received. His suit was brought under the Federal Employers' Liability Act, 45 USCA Sec. 51, et seq. The employee, Powers, was injured on Booth-Kelly premises over which the railroad had constructed an industrial track pursuant to a spur-track agreement. Booth-Kelly's servant had left a wood cart so near the track that the nearest corner of the cart was only 42 inches from the nearest rail. Powers was caught between the caboose and the cart, when he undertook to climb out a door on the moving train. Booth-Kelly had violated a covenant in its spur-track agreement in which it agreed to keep material on its premises at least 6 feet from the nearest rail.

Southern Pacific notified Booth-Kelly of Powers' action against it, and tendered the defense to Booth-Kelly, and demanded that such defense be undertaken. The tender was declined. Southern Pacific in a separate action against Booth-Kelly seeks to recover indemnity for the amount it has actually paid Powers.

Besides the minimum clearance provision previously mentioned, Booth-Kelly in the spur-track contract agreed to indemnify "and hold harmless railroad for loss, damage, injury or death from any acts or omission of Industry, its employees, or agents, to the person or property of the parties hereto, and their employees, and to the person or property of any other person or corporation while on or about said track; * * *". The railroad sought recovery on two main grounds:

A. That Booth-Kelly specifically contracted to indemnify the railroad, and

B. That Booth-Kelly was primarily negligent while the railroad was passively negligent and therefore the latter should recover against the prime wrongdoer.

The case was tried in front of the trial Court in Oregon and the trial court found in favor of the Southern Pacific Railroad Company. The trial Court found that the Lumber Company violated its provision in the agreement with regard to keeping material at least 6 feet from the nearest track, and that this negligence was the principal and primary cause of Powers' injury. The lower Court also found that

both were concurrently negligent, and that another provision of the contract was applicable. We do not need to discuss that phase of the case here, although the Court of Appeals for the 9th Circuit reversed the trial Court on this particular point.

The Court of Appeals for the 9th Circuit relied heavily on the case of *Washington Gas Light Co. v. District of Columbia, supra.* The Court also examined Restatement of the Law of Restitution, Section 102, and Restatement of the Law of Restitution, Sec. 95.[1] This latter section provides in part that a person who acquiesces in a dangerous condition after discovery of the same is a joint tort-feasor. The Court observed that the lumber company alone was the party which made the chattel on its own land dangerous to others, and thus specifically came within the framework of Restatement of Restitution, Sec. 95. There was no evidence that the railroad acquiesced in this condition. Further the trial Court observed in making its decision that in the *Powers* case the railroad was specifically charged with causing the wood cart itself to remain on the track and failing to warn the workmen of its presence. The lower Court's finding in the action by the railroad that the lumber company's

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[1] "Person Responsible for a Dangerous Condition.

"Where a person has become liable with another for harm caused to a third person because his negligent failure to make safe a dangerous condition of lands or chattels, which was created by the misconduct of the other, or which, as between the two it was the other's duty to make safe, he is entitled to restitution from the other for expenditures properly made in the discharge of such liability unless after discovery of the danger, he acquiesced in the continuation of the condition." (Restatement, Restitution, Sec. 95.)

negligence was active and primary negatived "the existence of the acquiescence" mentioned in the comment to Section 95, Restatement of Restitution.[2] The Court also pointed out that the question in the action by the railroad against Booth-Kelly Lumber Company was not the same as the issues in front of the court when Powers sued the railroad originally. For example, the Court said:

> "But which acts of negligence was primary, or which active or direct, was not an issue in the Powers case."

It was Booth-Kelly in this case which asserted that the former action bound the railroad and that the former case determined that the railroad was solely negligent. This Court of Appeals rejected Booth-Kelly's argument, and said that the former case was simply determinative of the fact that Powers was injured, the extent of the judgment, and that a contributing proximate cause of these injuries was the negligent failure of Southern Pacific to furnish him a safe place to work, by failing to warn him of the presence of the wood cart. Thus the issue of negligence of the Booth-Kelly Lumber Company, and the

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[2]In Comment, Restatement of Restitution, 95:

"In all of these situations the payor is not barred by the fact that he was negligent in failing to discover or to remedy the defect as a result of which the harm was occasioned; in most of the cases it is because of this failure that he is liable. On the other hand, if the condition was such as to create a grave risk or serious harm to third persons, or their property, and the payor was, or from his knowledge of the facts, should have been aware that such a risk existed, his failure to make the condition safe is reckless, and he is not entitled to restitution."

issue of whether this negligence was primary or secondary was *again* litigated by the trial Court. In the case *now* before this Court, of course, the Idaho trial court refused to allow these questions to go to the jury, and refused to allow any findings along these lines to be made, and said that the first action had definitely determined that Bedal was the one primarily negligent, and that Bedal was bound by that finding.

There are numerous distinctions that must be made. If the court follows the principles laid down in the *Booth-Kelly* case it becomes clear that the action of the trial court in directing a verdict in favor of the Lumber Company must be reversed. Let us examine these differences one by one.

1. It was the Southern Pacific Railroad Company, a party to the action against Powers, that gave notice to the lumber company to defend that action, and requested and demanded that they take part in the defense. In this case, the Union Pacific Railroad Company was the party to the action brought by Powell. The Union Pacific Railroad Company never gave any notice to Bedal to defend the case. Neither did the Lumber Company ask or request that Bedal defend the case. The Lumber Company only stated in a letter to Bedal that if Powell did recover against the Railroad, and if the Railroad sought and recovered against the Lumber Company, that eventually the Lumber Company would hold Bedal responsible for any such damage. This was not and cannot be

a tender of defense. As a consequence Bedal would not be responsible for any finding or conclusion reached in the case of Powell v. Union Pacific Railroad because that decision was not *res judicata* as far as Bedal is concerned.

2. The Booth-Kelly Lumber Company was also adjudged responsible and liable to the railroad by reason of its indemnity agreement. Bedal will discuss this holding and finding in his argument arising from Bedal's appeal from the decision in favor of the Union Pacific Railroad Company, and against the Hallack and Howard Lumber Company. Suffice it to say at this point that the agreement in question was a spur-track agreement, covering what might occur on Booth-Kelly's property. The contract between The Hallack and Howard Lumber Company, and the Union Pacific Railroad Company was not a spur-track agreement. It was an agreement whereby the Railroad leased its ground to the Lumber Company.

3. The issue of primary negligence and the issue of Booth-Kelly's negligence, were all issues that the court stated were *not* determined in the case of *Powers v. The Southern Pacific Railroad Company.* The trial court considered these points for the first time and made findings in favor of the railroad company, but after a trial. In this case the Idaho trial court refused to allow these issues to be submitted to a jury, but held they were all determined in the first action brought by Powell against the Railroad.

4. There was no finding made in the Booth-Kelly case that the railroad knew of the dangerous condition presented by the cart being on the track. In the case at hand, all of the eviednce indicates the Union Pacific had full knowledge for months preceding the injury to Powell of the method that logs were unloaded. This knowledge brings the case squarely with Restatement of Restitution, Sec. 95. As a matter of law the Union Pacific Railroad Company acquiesced in any dangerous condition that might have existed.

5. The evidence in the case in front of this Court shows that as a matter of law Bedal was not negligent, and as a matter of law the trial court should have found in favor of Bedal and it was error not to do so. Bedal's motion for a directed verdict should have been granted.

The trial court not only failed to follow the principles laid down in the *Booth-Kelly* case, but followed rules of law that simply do not exist. Bedal was held responsible for damages paid by the Lumber Company by reason of its contract with the Railroad Company, without even a chance to have the facts surrounding all the circumstances passed upon by a jury. Bedal is not even allowed to benefit from an instruction that Powell's contributory negligence would be a bar to his recovery since such a defense was not available to the Railroad. 45 *U.S.C.A.* 379, Sec. 53. Exhibit 7, p. 188.

Bedal has used the *Booth-Kelly* case in the Appendix because it points up many of the issues to be found in the case before this court and should be carefully and fully analyzed. Appellant believes a comparison of the two cases with the different factual situations shows conclusively and without doubt that the trial court erred in directing a verdict in favor of the Lumber Company. We firmly feel that there is no evidence whatsoever in the record, of either the case as tried by the Idaho District Court, or the Powell case tried two and a half years earlier, which shows negligence on the part of Bedal whatsoever. Furthermore, that record does show that Railroad was estopped from claiming contribution or indemnity from Bedal because it was a joint tort-feasor, acquiescing in a dangerous condition. This being the case it was error for the trial Court to fail to grant a directed verdict in favor of Bedal since the Lumber Company stands in the same shoes as the Railroad, and, at the very least, error for failing to submit these questions to a jury.